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No. 82-

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: January 26, 1983

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QUESTIONS PRESENTED

This private action sought recovery under both state tort law and the federal antitrust laws for the identical injury to plaintiff's business. The courts below sustained the tort recovery and trebled the damages because they found a Sherman Act "conspiracy" between a parent corporation and its wholly-owned subsidiary to delay plaintiff's market entry. Two basic questions of federal antitrust law are presented:

1. What is the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act?

2. In a rule of reason antitrust case, can injury to competition be established without analysis of the structure of the relevant market and proof that defendants possess sufficient market power to have an adverse effect on that market?

PARTIES TO THE PROCEEDINGS

Petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, were appellants below. Copperweld Corporation is a publicly held company. Approximately 66% of its outstanding common stock is held by Imetal, a French holding company. Various agencies of the French government hold a majority of the stock of Imetal. The remaining stock of Imetal is publicly traded. Copperweld Corporation holds a 46¼% interest in Guardian Oil Company, a 50% interest in Guardian Production Company and a 45% interest in Japan Alumoweld Company, Ltd.[1]

Regal has no subsidiaries.

Respondent Independence Tube Corporation and its president, David F. Grohne, were appellees below.

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[1]The remaining interests in those companies are held in the following percentages:

Guardian Oil Company	
Allegheny International Energy Corp.	46¼%
Other (Curtin & Co.; Fitch & Co.; Pavonis Ltd.; Venrock Associates; Vogt Associates; Brown Partners Ltd.; Fidelity Ventures Ltd.; Graylock Partners & Co.; Davenport & Co. of Virginia, Inc.; Red River Venture Inc. and certain individuals)	7.5%
Guardian Production Company	
Allegheny International Energy Corp.	50%
Japan Alumoweld Company, Ltd.	
Fujikura Ltd.	45%
C. Itoh & Company, Ltd.	10%

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Copperweld Corporation and Regal Tube Company, respectfully pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the Seventh Circuit entered on October 1, 1982 and December 21, 1982.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 691 F.2d 310 and appears as Appendix A. The unreported opinion of the district court denying petitioners' motions for judgment notwithstanding the verdict and a new trial appears as Appendix B.

JURISDICTION

The judgment of the court of appeals on the merits was entered on October 1, 1982. (App. F) A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was

denied on November 1, 1982. (App. G)[1] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

STATEMENT OF THE CASE

This is a case of a parent corporation found guilty of "conspiring" with its wholly-owned subsidiary. This "conspiracy" transformed a claim of interference with contractual relations under state tort law into a violation of Section 1 of the Sherman Act and an award for treble damages and attorneys' fees in excess of $9 million. The Seventh Circuit's affirmance of that award puts in issue whether the court applied erroneous legal standards in concluding: *first*, that petitioner Copperweld Corporation was capable of entering into a Sherman Act conspiracy with its wholly-owned subsidiary, petitioner Regal Tube Company, and *second*, that the conspiracy resulted in a restraint on trade, and not merely on respondent, when the relevant market remained structurally and functionally competitive before, during and after the asserted conspiracy.

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[1] On January 19, 1982, while the appeal on the merits was pending in the court of appeals, the district court entered judgment on respondent's request for attorneys' fees and costs under 15 U.S.C. § 15. That judgment was superseded by the district court's order and opinion of June 21, 1982 (App. C), as amended by its order and opinion of July 16, 1982. (App. D) On December 21, 1982, the court of appeals granted the petitioners' unopposed motion to enter judgment on the award of fees and costs and to consolidate that judgment with the judgment on the merits. (App. E)

1. Factual Background

The essential facts are not in dispute. Regal began its existence in 1955 as a Chicago firm manufacturing structural steel tubing for use in heavy equipment, vehicles and construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C.E. Robinson Company. In 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc. In 1972 Regal was purchased by Copperweld and again set up as a wholly-owned subsidiary to avoid discriminatory double taxation by Pennsylvania (where Copperweld is headquartered) and Illinois. (691 F. 2d. at 313-14; App. A-3; Kaplan Tr. 5702; Smith Tr. 3051)

Under Copperweld, as before, Regal operated with its own separate facilities and plant personnel. Regal's headquarters, however, were consolidated with those of Copperweld in Pittsburgh; all of Regal's officers and directors were Copperweld officers and directors; and Regal's financial reports and SEC filings were fully consolidated with those of Copperweld. At no time were Copperweld and Regal held out as competitors and at no time did they actually compete. (691 F.2d at 314, 320; App. A-3, A-16-17; Breedlove Tr. 4875-84, 4892, 4900-02, 4909-10; Foster Tr. 4268)

When Regal was purchased by Copperweld in February 1972, its General Manager was David F. Grohne. Although Grohne was asked to continue in that capacity, he chose to become Lear Siegler's Corporate Secretary. While Grohne remained with Lear Siegler, but unknown to either his employer or Regal, he incorporated respondent Independence Tube Corporation and took steps to set it up as a competing steel tubing manufacturer. In December 1972, his new company gave The Yoder Company, a builder of manufacturing facilities for others, a purchase order for a mill to fabricate the tubing. (691 F.2d at 313-14; App. A-3; Grohne Tr. 373-75; Uzarowicz Tr. 4339-43)

Copperweld learned of respondent's plans in late 1972. Petitioners' Chairman sought legal advice on whether the

five-year non-competition agreement that Lear Siegler had signed when it sold Regal applied to Grohne as a former officer. Copperweld was advised that the agreement did not, but that respondent might be enjoined if it used any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," which had been included in the sale. (691 F.2d at 314; App. A-4) Copperweld was further advised to send letters to a number of potential suppliers of respondent to notify them of petitioners' proprietary rights and prevent them from developing reliance interests that might later make a court reluctant to enter an injunction at Copperweld's behest. (*Id.*)

One of the Copperweld letters was sent to Yoder in February 1973. Yoder reacted by refusing to supply the tubing mill ordered by respondent. Although respondent secured an alternative supplier, its entry into the tubing business was delayed nine months. (*Id.*)[3] There was no evidence that petitioners' concern with what they felt was unfair competition by a former employee was part of a broader scheme to restrain competition by rival steel tubing manufacturers.

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[3] In addition to the letter to Yoder, the District Court found that petitioners' activities included: "telephone calls between [Copperweld] and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's product." (App. B-7) Whereas respondent argued these activities were part of a scheme to keep it out of the tubing business, petitioners contended they were part of the effort to gather information and protect against respondent's invasion of Regal's proprietary rights. In practical terms the dispute is immaterial, since it was undisputed that the only "conspiratorial" act found by the jury to have injured respondent was the February 1973 letter to Yoder. (App. B-4)

Regal was one of a dozen firms in the national market and ranked second or third with a market share ranging from 12% to 16%. Petitioners never attempted to exclude any of these competitors or any other potential entrants from the structural steel tubing market. (PX 27, 475, 1015; Brozen Tr. 5563-64, 5593-95)

2. Proceedings Below

Respondent Independence commenced this action in the United States District Court for the Northern District of Illinois in 1976. Its complaint as amended alleged that petitioners had conspired with Yoder to block respondent's entry into the steel tubing market in violation of Section 1 of the Sherman Act, had attempted to monopolize that market in violation of Section 2 of the Sherman Act, and had interfered with respondent's contractual relations with Yoder.[4] Petitioners counter-claimed, charging Independence and Grohne with unfair competition by taking Regal's proprietary information and key employees. (691 F.2d at 314-15; App. A-5)

Before trial respondent dismissed its Section 2 claim. The district court directed a verdict against petitioners on their counterclaims and sent respondent's remaining claims to the jury. The jury found that there was no Section 1 conspiracy involving Yoder, but only between petitioners, and that Copperweld had tortiously interfered with respondent's contract with Yoder. At the subsequent damage trial, the district court instructed the jury that respondent's injury from petitioners' Section 1 conspiracy was identical to the injury from the interference with the Yoder contract, and the jury set both figures at $2,499,009. After trebling (and the award of $15,000 for the defamation claim), judgment was entered against petitioners for $7,512,027, plus reasonable attorneys'

[4] Respondent also alleged breach of contract by Yoder and trade defamation by petitioners, but those pendent claims are not in issue here.

fees and costs. (*Id.*) The fees and costs were later set at $1,814,673. (App. C)

On appeal, the Seventh Circuit affirmed the judgment in all respects. In response to "appellants' broadly based attack" on the finding of a conspiracy between Copperweld and its wholly-owned subsidiary, the court acknowledged that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; App. A8-9; citing Handler and Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), including the bibliography at 23 n.3, and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982)). The court explained:

> "The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value. They also point out that government enforcement agencies do not use the doctrine. Rather it surfaces in private suits—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies. Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed, and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal." (691 F.2d at 317; App. A-9-10; footnotes omitted)

Despite these compelling objections, the Seventh Circuit stated that judicial reactions to the intra-enterprise conspiracy doctrine have been "constrained" by this Court's rulings since, "while they need not be read with complete literalism,

of course they cannot be ignored." (*Id.*; footnote omitted) The result has been substantial divergence among the circuits, as they have adopted "various limiting approaches—but no move to abolish the doctrine root and branch." (*Id.* at 317-18; App. A-11)

The Seventh Circuit stated that its own approach had been established in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). It characterized its "test" as focusing on "a variety of factors" indicating "when there is enough separation between the two entities to make treating them as two independent actors sensible" for conspiracy purposes. (*Id.* at 318; App. A-11) It then sustained an instruction by the district court that made no mention of three of the five "factors" earlier relied upon in *Photovest*, including "the extent of the integration of ownership" between parent and subsidiary. The instruction approved by the court of appeals substituted a new nine-point test that concluded:

> "You must consider all of the facts, and that includes the nine I have given you here, *and any other facts that you think are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; App. A-41)[5]

The court recognized that its ruling left the applicable test in an "unsettled stage of development," but asserted that "the uncertainties that necessarily exist now will be obviated as the test is applied and refined." (*Id.* at 318; App. A-11-12)

Turning to the question whether respondent's delay in entering the structural steel tubing market had any adverse effect on competition, the Seventh Circuit rejected petitioners' reliance on *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980), in which the court had ruled: "[W]here the challenged restraint [takes] the form of unfair

[5] Emphasis has been added, except where otherwise stated.

competition, we think that the *market power of the defendant*, both before and after the allegedly anticompetitive conduct *is a particularly important factor*" to consider. (*Id.* at 558) The court turned aside petitioners' argument that the jury and the reviewing court were required to consider the record evidence that the structural steel tubing market was at all times competitively structured and that petitioners' market share fell well below the threshold for anticompetitive concern. According to the court, "*Havoco* does not say that harm in the relevant market is demonstrable only by market share evidence, but rather that the relevant market must be defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown." (691 F.2d at 322; App. A-21-22) The court also stated that the market share analysis applied in *Havoco* was required only where "an actual competitor is harmed or driven out of business," and not in a case involving the "foreclosure" of a new entrant. (*Id.*)

REASONS FOR GRANTING THE WRIT

The result below elevates a private commercial controversy, properly cognizable under state tort law, into a violation of national competition policy punishable by treble damages. In doing so, it points up the need for this Court to settle two issues of recurring controversy under the antitrust laws. *First*, this Court should re-examine the intra-enterprise conspiracy doctrine—which has led to confusion among the circuits and the business community and generated results inconsistent with rational antitrust principles—and rule that a parent and its wholly-owned subsidiary are incapable of a Sherman Act conspiracy. *Second*, this Court should confirm that defendants cannot be found liable in rule of reason cases without a careful analysis of market structure and market shares to establish an adverse effect on competition.

I. This Court Should Re-examine The Intra-Enterprise Conspiracy Doctrine And Rule That A Wholly-owned Subsidiary Is Incapable Of A Sherman Act Conspiracy With Its Parent.

This Court first announced the broad outlines of the intra-enterprise conspiracy doctrine in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). Thirty-five years later, the Seventh Circuit has put forward a test for its application that it frankly describes as still in "an early and unsettled stage of development." (691 F.2d at 318; App. A-11) Using this test the court of appeals has sustained an award of treble damages for actions that would have constituted only tortious interference with contract had they been carried out scarcely a year earlier, when Regal operated as an unincorporated division rather than a subsidiary corporation.[6] This random result illustrates the general confusion among the circuits, dramatizes the irrationalities in the doctrine's application, and underscores the need for this Court to fashion a new rule that is consistent with sound antitrust principles.

A. The disarray among the circuits.

The intra-enterprise conspiracy doctrine has spawned nearly 190 reported decisions since *Yellow Cab*.[7] Yet the circuits have been unable to arrive at a consistent, or even reconcilable, rule for its application. Respected commentators have concluded that "[t]he cases, commentary and settled practices are in disarray" (Sullivan, *Handbook of the Law of Antitrust* § 114 at 323 (1977)); that the doctrine "invites the inappropriate or even irrelevant application of

[6] The courts agree that an unincorporated division is not a separate entity capable of conspiring with the parent in violation of Section 1. *E.g., H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[7] A compendium of these decisions appears as App. H. Whereas there were only 17 decisions in the ten years following *Yellow Cab*, there were over 125 in the last decade.

substantive rules designed to deal with cartel or other truly conspiratorial behavior" (Areeda, *Antitrust Analysis* ¶ 334 at 401 (3d ed. 1981)); and that "it exalts form over substance without providing any countervailing antitrust benefits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 72)

The Ninth Circuit dramatically describes the confusion among the circuits: "The antitrust cases determining the existence or absence of any intra-enterprise conspiracy, when taken collectively, resemble a thaumatrope.[8] Rules seemingly clear on their face become an unresolved conceptual blur when applied to the variant fact situations presented by diverse economic entities and functional structures." *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625 (9th Cir. 1977). Summed up succinctly: "The circuits . . . do not agree on the limits of [the] intra-enterprise conspiracy doctrine." *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981)

At least five divergent tests have been developed for the doctrine's application. Applied in ad hoc fashion, sometimes inconsistently within the same circuit, these tests provide no legal standard that is either theoretically defensible or practicably workable.

The test advanced by the court below is illustrative. Aptly described as the "all the facts and circumstances" test,[9] it

[8] "[A] scientific toy illustrating the persistence of visual impressions, consisting of a card or disc with two different figures drawn upon the two sides, which are apparently combined into one when the disc is rotated rapidly . . . ." II *The Compact Edition of the Oxford English Dictionary* at 3278 (Oxford Press 1971)

[9] Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. In addition to the Seventh Circuit, this test has been adopted on occasion by the Eighth and Ninth Circuits. *E.g., Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973).

gives the jury free rein to consider nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (*Id.* at 332; App. A-41) Although put forward as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem" (691 F.2d at 318; App. A-12), its very formulation accentuates the indeterminacy that plagues the doctrine.

The Seventh Circuit itself acknowledged "the uncertainties that necessarily exist" in its approach, which involves "the presence or absence of various unranked factors" and "the possibility that the list will expand or contract." (*Id.*) Handler and Smart correctly point out that such an open-ended approach gives the intra-enterprise conspiracy doctrine "no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. . . . [W]here the case is tried to a jury, the jury should not be left adrift in an uncharted sea to determine whether separate but affiliated companies function as a single economic unit." (3 Cardozo L. Rev. at 59-61.)[10]

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[10] The Seventh Circuit rationalized the verdict *ex post facto* on evidence that Copperweld acquired Regal to enter a new market, permitted Regal to continue to serve that market, left substantial operating authority in local management, which had a separate sales force and made its own arrangements with suppliers, and compensated that management primarily on the basis of Regal's profits. (691 F.2d at 320; App. A-16-17) Yet, comparable evidence could be adduced regarding nearly every firm that operates a new subsidiary under modern management techniques giving autonomy to local management. (*See, e.g.*, P. Drucker, *Management* 575, 579-80 (1974)). Penalizing such a firm turns the intra-enterprise conspiracy doctrine on its head: "Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to the fullest extent." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 75.)

The four alternative formulations of the intra-enterprise conspiracy doctrine adopted in other circuits only add to the confusion, without providing a supportable basis for the doctrine's application:

> **The "holding out" rule**, suggested by the Second Circuit and at least one court in the Sixth Circuit, finds no conspiracy if the affiliated corporations have not held themselves out or actually functioned as competitors.[11] While this test would lead to a different result here, and derives from language in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (*see* p. 18 n. 17 *infra*), it has been criticized because the indicia of "holding out" have never been delineated and no clear relationship with legitimate antitrust concerns has been articulated. (*See* Note, *supra*, 95 Harv. L. Rev. at 669-70; Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. *But see* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20 (1968))
>
> **The "sole decisionmaker" rule**, endorsed by the Fourth and Ninth Circuits, finds no capacity when the affiliated corporations are owned and controlled by one person who had the power to make decisions as to both.[12] Although the commentators commend the test for focusing on ultimate legal control, they find no basis for limiting its no capacity finding to cases where the sole owner made the challenged decision. (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 48-49)

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[11] *E.g., Triebwasser & Katz* v. *AT&T*, 535 F.2d 1356, 1358-59 (2d Cir. 1976); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1045 (E.D. Mich. 1976). *But see William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) (rejecting the rule); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110, 117 (E.D.N.Y. 1976) (same)

[12] *E.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

The "external effect" rule, applied by several district courts, finds no conspiracy where the concerted action is "internal" and restrains no outsider's trade.[13] This rule has been criticized as "unworkable and unreal" (see *Ogilvie, supra,* 641 F.2d at 588 n.20) in attempting to segregate corporate decisions that necessarily have some effect on third parties into abstract categories of "internal" and "external." The result has been to treat similar conduct as "external" and "internal" in different cases. *Compare Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981) *with Universal Lite Distributors, Inc.* v. *Northwest Indus. Inc.*, 452 F. Supp. 1206, 1216 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979).

The "absolute" rule of the First, Third and Fifth Circuits holds that, as a matter of law, a parent and its wholly-owned subsidiary are always capable of conspiracy, without further inquiry.[14] This rule is in apparent conflict with recent decisions of this Court discussed at pp. 18-19 *infra* and makes the inevitable communications among affiliates into self-proving conspiracies. (Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 727-29

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[13] *E.g., REA Express, Inc.* v. *Alabama Gr. S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *Thomsen* v. *Western Electric Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982).

[14] *E.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978). *But see White* v. *Hearst Corp.*, 669 F.2d. 14 (1st Cir. 1982); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093, 1094-95 n.1 (3d Cir. 1972).

(1977)). It is "like condemning the bi-sexual oyster for incest." (Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5, 27 (1963))

These conflicting approaches have splintered the intra-enterprise conspiracy doctrine into particularized rulings that frustrate intelligent planning by corporate managers and counsel. Consequently, responsible antitrust analysts from the academic community, the bar and the business world have increasingly urged its re-examination by this Court and the formulation of a new, consistent and realistic standard for its application. The recent article by Professor Handler and T.A. Smart, to which the Seventh Circuit several times referred, is a particularly comprehensive analysis of the shortcomings in the present doctrine.[15] The authors conclude, with language especially apt here:

> "When analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept. A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization. Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition.
>
> • • •
>
> "We conclude that where a subsidiary is wholly owned or controlled by its parent or where affiliated corporations are wholly owned or controlled by the same parent, the policies of the antitrust laws would best be served by holding as a matter of law that the corpora-

[15] For the Court's convenience, petitioners have reprinted this article as App. I.

tions are incapable of conspiring." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25; footnote omitted)[16]

Under present doctrine, unilateral conduct can become an antitrust conspiracy based on the purely formal distinction that a firm has acted through a subsidiary corporation rather than an unincorporated division, though each performs identical functions. "Rules based on such distinctions defy rational application and themselves promote behavior inconsistent with antitrust goals." (Note, *supra*, 95 Harv. L. Rev. at 662) The reason is that, by penalizing separate incorporation while allowing the same action by unincorporated divisions, "the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units." (McQuade, *Conspiracy, Multicorporate Enterprises, And Section 1 Of The Sherman Act*, 41 Va. L. Rev. 183 (1955))

The Seventh Circuit agreed that abandonment of subsidiary operations can eliminate important efficiencies of benefit to the firm as well as the consumer. (691 F.2d at 317 n.7; App. A-10) Use of subsidiary corporations can permit small firm entrepreneurs who consolidate with larger enterprises to retain a minority interest in their own businesses, can accom-

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[16] Other illustrative commentaries include: Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 21 ("the net result [of the existing case law] is thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts—leaving no one able to point with confidence to the location of the boundary between legal and illegal business conduct"); Areeda, *supra*, at 401 ("[t]he present state of the intra-enterprise conspiracy doctrine is not easy to divine"); Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 Duq. L. Rev. 63, 69 (1975) (there is a "universally-felt need to establish some limits on the intra-enterprise conspiracy doctrine"); Note, *supra*, 95 Harv. L. Rev. at 681 ("These [antitrust] goals would be best served by a Court ruling that related corporations are legally incapable of conspiring among themselves in violation of section 1")

modate differing personnel and incentive policies within a single corporate family, can improve management accountability and efficiency, can prevent discriminatory double taxation, can allow corporations to accommodate special investment conditions in foreign operations by encouraging minority foreign national investment, and can let firms comply with regulatory policies designed to insulate regulatory customers from outside business risks. (*E.g.,* The Bank Holding Act, 12 U.S.C. 1843(c) (requiring separate incorporation of designated non-banking businesses))

Under current doctrine an attempt to achieve any of these perfectly legitimate benefits—or to comply with legal requirements—is tied to heightened antitrust risk. This result would be rational only if separate incorporation, or the attendant benefits, were in some way related to a threat to competition. They are not. "The business, tax, social or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (Areeda, *supra,* at 399-400)

The result of the doctrine is thus to "promote behavior inconsistent with antitrust goals by encouraging firms to select less efficient and more centralized forms of organization," without supplying any compensating advantages for antitrust policy. (Note, *supra,* 95 Harv. L. Rev. at 681) It is hardly surprising, as the Seventh Circuit itself acknowledged, that the commentators have been "almost uniformly critical" of the doctrine (691 F.2d at 316-17; App. A-9), or that they have reached the conclusion that "[t]he current disagreement among the circuits concerning the intra-enterprise issue demands resolution by the Supreme Court." (Note, *supra,* 95 Harv. L. Rev. at 681)

B. The need for clarification by this Court.

This Court's prior pronouncements are the source of much of the uncertainty concerning the precise scope of the intra-

enterprise conspiracy doctrine. Early opinions suggested a rule of sweeping application; more recent decisions have given a narrower cast to the doctrine. The result has been the understandable confusion among the circuits, the bar and the business community.

Typical of the earlier decisions is *Yellow Cab*. Defendants were a group of affiliated individuals and corporations charged with conspiring to restrain and monopolize taxi fleets in four metropolitan markets, in part through the acquisition of individual operators. The Court rejected the defense that the "restraints occur in a setting described by the appellees as a vertically integrated enterprise," by observing:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed." (332 U.S. at 227)

Noting the factual context of the case, the commentators have rightly emphasized that this language can be read as meaning simply that common ownership will not preclude liability where a series of acquisitions leads to an unreasonable restraint of trade or monopoly. "This is hardly a startling or disputable proposition and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to section 1." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 29) Nevertheless, as Professor Areeda has commented, *Yellow Cab* demonstrates "the tendency of judicial language, once launched, to continue in life independent of its roots or policy." (Areeda, *supra*, at 406; *see also* at 398)

Thus, the *Yellow Cab* language became a "rule" in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593,

598 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968). There, the Court (per Black, J.) cited that "rule" without analysis, merely reiterating that "common ownership and control does not liberate corporations from the impact of the antitrust laws."[17] Yet, each of those cases could have been decided on an alternative basis. For example, commentators have pointed out that *Kiefer-Stewart* can be understood as simply a case of coerced vertical price-fixing between plaintiff and defendants. (Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 45) In *Perma-Life* the Court itself suggested an alternative holding on just such a theory. (392 U.S. at 142) And *Timken* has been explained as a horizontal conspiracy between companies lacking a true parent/subsidiary relationship. (Note, *supra*, 75 Mich. L. Rev. at 722)

Significantly, in two of the Court's more recent decisions, it has declined to find a parent-subsidiary conspiracy after examining the economic realities of the corporate relationships under attack. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court rejected a finding of conspiracy between Sunkist and two wholly-owned subsidiaries, "even though they have formally organized themselves into three separate legal entities." (*Id.* at 29) The Court reasoned that "[t]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers . . . There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." (*Id.*)

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[17] The language of *Kiefer-Stewart* did contribute an additional variable to intra-enterprise conspiracy adjudication. There, this Court said: "The rule is especially applicable where, as here, respondents hold themselves out as competitors." 340 U.S at 215. This statement gave rise to the "holding out" rule discussed at p. 12 *supra*.

In its most recent ruling, *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), the Court refused to find a conspiracy between Citizens & Southern and a group of correspondent branch banks, although they were only five percent owned. The Court concluded that the challenged communications were an integral part of "the sharing of expertise and information which was at the heart of the correspondent associate programs." (*Id.* at 114) It distinguished the situation where "independent competitors have no permissible reason for intimate and continuous cooperation and consultation." (*Id.* at 113-14)

Particularly in light of *Sunkist* and *Citizens & Southern*, this Court should re-examine the "rule" of *Yellow Cab* and formulate new standards to remove the escalating confusion among the circuits and the resulting uncertainties for business planning.[18]

C. A principled and practical alternative to the existing confusion.

We urge this Court to hold as a matter of law that where a parent owns 100% of the voting stock of a subsidiary, or two subsidiaries are wholly-owned by a common parent, the affiliated corporations are incapable of a Sherman Act conspiracy. This rule would recognize that, where there is a complete unity of legal and economic interests, a parent and subsidiary should be viewed as a single enterprise. The proposed rule would remove the artificial distinctions between unin-

[18] This case presents a situation not unlike *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Before *Sylvania*, the legality of distributor arrangements had come to depend on whether they could be characterized as a "sale" or a "consignment" relationship, a confusing distinction devoid of antitrust significance. As here, the existing rule had skewed business choices with a risk factor unrelated to efficient competition and the lower courts had developed conflicting exceptions to prevent some of the rule's more irrational effects. This Court resolved the conflict by adopting a new standard that looked to whether the vertical arrangement is likely to have meaningful anticompetitive consequences.

corporated divisions and wholly-owned subsidiaries and would no longer lead corporate managers to prefer the former without regard to the real efficiencies for the firm or the consumer.

Where one company has the legal authority to control the actions of another an "agreement" or "conspiracy" between the two companies does not add anything to the market power of the first company and does not affect the autonomy or economic independence of the second. The concerns of Section 1 of the Sherman Act are simply not implicated. If gaining legal control in itself presents antitrust concerns, that is, of course, the domain of Section 7 of the Clayton Act; if the conduct of the combined entity is anti-competitive, that is the domain of Section 2 of the Sherman Act. A conclusive rule based upon complete ownership recognizes both the practical reality of legal control and the integrity of the statutory scheme of the antitrust laws.[19]

Indeed, the same principles would support this Court's consideration of a broader rule that would preclude a finding of capacity whenever a parent owns more than 50% of a subsidiary. The latter approach is consistent with other regulatory and statutory approaches to the "control" issue. For example, the United States Department of Justice stated in its 1977 *Antitrust Guide For International Operations:*

> "[A] parent corporation may allocate territories or set prices for the subsidiaries that it fully controls. The Department's test has generally been formulated in

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[19] *See also Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), where the Fifth Circuit held that a transfer between a parent and a wholly-owned subsidiary could never be considered a "sale" for Robinson-Patman Act purposes: "The realistic effect on competition should control rather than esoteric and theoretical possibilities under . . . [a] theory couched in terms of 'control' and 'arm's length dealings.' . . . [U]nderlying substance controls surface form in economic and antitrust importance."

terms of whether the parent controls a majority of the voting stock of the subsidiary." (*Id.* at 12-13)

The Department has also used the majority-owned standard in formulating and administering numerous consent decrees in recent years. (*ABA Antitrust Consent Decree Manual* 52-53 (1979)) Similarly, this standard comports with Hart-Scott-Rodino principles (16 C.F.R. § 801) (controlling corporation is one holding 50% of outstanding voting securities).[20]

Either the wholly-owned or majority-control test will curtail antitrust liability in some cases, and require reversal in the present. It will not interfere, however, with legitimate enforcement concerns. In cases like *Yellow Cab*, Section 1 will remain available to challenge anticompetitive schemes effected through the creation or acquisition of wholly-owned subsidiaries, and integrated enterprises will remain subject to the single firm anti-monopoly standards of Section 2. Finally, state law remedies will retain their rightful role in scrutinizing the type of conduct alleged here. As Handler and Smart stress:

"[T]he common law of unfair competition reaches such behavior as . . . interference with contractual relations. While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the

[20] Under such a standard, the question whether affiliated corporations are capable of antitrust conspiracy would be a fact issue only where the parent owns 50% or less of the voting stock of the subsidiary. Again, this is consistent with the Justice Department *Antitrust Guide For International Operations*, which states that, "when majority stock control is not present, the Department may make a careful inquiry into the facts of the particular case." (*Id.* at 13) Even in those circumstances, this Court should make clear that the focus should be on whether the parent has *legal* control of the subsidiary.

very same unfair competitive practices are carried out by a company through its division." (3 Cardozo L. Rev. at 71)

II. This Court Should Confirm That Defendants Cannot Be Found Liable In Rule Of Reason Cases Without A Careful Analysis Of Market Structure And Market Shares To Establish An Adverse Effect On Competition.

The prospect of recovering treble damages and attorneys' fees gives plaintiffs powerful incentive to cast state tort actions as federal antitrust claims, and to portray private injury as injury to competition. If state business tort law is not to be swallowed by the antitrust laws, and the federal courts swollen with commercial grievances masquerading as antitrust claims, this Court must insist that the lower courts demand—as the courts below did not—a persuasive demonstration of injury to competition, and not simply injury to a competitor. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). In particular, this Court should reject the Seventh Circuit's conclusion that, in rule of reason cases, it is unnecessary to examine the structure of the relevant market or to assess whether defendants possess sufficient market power to have an adverse impact on *competition* in that market.

Both the courts below identified the relevant market as structural steel tubing. (691 F.2d at 315; App. A-5; App. B-7) It was undisputed that this market was competitive before, during and after the assertedly conspiratorial actions that temporarily blocked respondent's entry. It was equally undisputed that Regal's market share (to which Copperweld added nothing) did not approach the threshold for a finding of monopolization or attempt to monopolize. In fact, respondent dropped its Section 2 claim following discovery. (*See* p. 5 *supra*) Yet, neither of the courts below gave any consideration to these market realities. Indeed, they viewed an examination of market shares and market structure as unnecessary to a resolution of the issue of competitive impact.

Thus, the district court refused to give instructions on the importance of market structure and market share evidence, rendering it impossible for the jury to make a meaningful evaluation of the competitive impact of the challenged conduct.[21] Likewise, the Seventh Circuit assumed, without a critical review of the structure of the steel tubing market, that the exclusion of respondent necessarily led to a diminution of competition: "[T]he injury Independence claimed flowed directly from the defendants' conspiracy to keep it from going into business *as their competitor*, a clear violation of Section 1 of the Sherman Act." (691 F.2d at 322; App. A-20)

Correct economic analysis and judicial decisions from other circuits demonstrate, however, that the competitive effects of the exclusion of a competitor can be assessed only after considering the level of concentration in the relevant market, the number of competitors, and the dispersal of their market shares.[22] The Seventh Circuit was particularly in error in believing that market share analysis is required only where "an actual competitor is harmed or driven out of business," but not "in a foreclosure case" involving a potential new entrant. (*Id.* at 323; App. A-22) The court ignored the substantial body of economic teaching—developed under Section 7 of the Clayton Act, but equally applicable

[21] The Seventh Circuit's assertion that the trial judge did not preclude closing argument and instructions on market shares (691 F.2d at 322 n.20; App. A-21) does not comport with his rulings: "I hope we don't get closing argument about market share . . . . Because I have no more desire to hear you argue about market share, either of you, than I did to hear the testimony about market share, since I don't understand the relevance of it. . . . [Y]ou know what instructions I propose to give and you won't find anything in there about market share. . . ." (Tr. 4784-85)

[22] *E.g.*, *Northwest Power Products, Inc.* v. *Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). *See also Kaplan* v. *Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Robert's Waikiki U-Drive, Inc.* v. *Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199 (D. Hawaii 1980).

here—that the foreclosure of a new entrant will have no anticompetitive effect where the relevant market is already competitive. As this Court stated in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974):

> "The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market . . . with the capacity effectively to determine price and total output of goods and services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant."[23]

The other reasons advanced by the Seventh Circuit for rejecting a careful market share analysis also lack merit. The court suggests that such an analysis was obviated by the trial court's instruction that: "Independence must establish by a preponderance of the evidence that the delay in its entering into business resulted in a decreased supply or higher prevailing prices in the market *or otherwise adversely affected competition in the relevant market.*" (691 F.2d 322; App.

[23] Part of the Seventh Circuit's difficulties stems from its misapprehension of the market analysis that is required in a potential competition case. The court suggests that a focus on market shares should be inapplicable in the present case because Regal's market share would not have "*increased* as a result of Independence's foreclosure from the market." (691 F.2d at 323; App. A-22) But this would be equally true in a Section 7 context; the firm that acquires a potential competitor does not thereby increase its market share. In neither case, however, does this mean that market analysis should be dispensed with—as the *Marine Bancorporation* case demonstrates. The court of appeals also erred in believing that Regal "maintain[ed] its market share so long as Independence was kept out of the steel tubing business, but lost ground to Independence once the latter began production." (*Id.*) No "concession" to this effect was made by petitioners and the record was to the contrary. (*Compare* Tr. 4777-79 and PX 27)

A-21) Stated as it was in the alternative, however, this tautological instruction told the jury only that it could find an adverse effect on competition if respondent showed an adverse effect on competition. Even the first two alternatives gave the jury no guidance on how it could find an effect on price or supply in a market that was structurally and functionally competitive. This failing was especially troublesome since the only economist who appeared at the liability trial testified that the elimination of respondent's supply had no impact on price. (Brozen Tr. 5462-65, 5613-14)

Finally, the Seventh Circuit is mistaken that market shares need not be examined so long as the relevant market is "defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown." (691 F.2d at 322; App. A-21) By itself, a correct market definition provides no insight into whether there has been any adverse effect on competition. It is the beginning, not the end, of a proper competitive analysis.

This Court should act to rectify the result and the reasoning below. The Court should make clear that adverse effect on competition in rule of reason cases cannot be established where the defendants lack sufficient market power to affect competition in the relevant market. The Court should reaffirm that no resolution of this issue can be made by the fact-finder or the reviewing court without a careful examination of market shares and market structure. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948) ("In determining what constitutes unreasonable restraint, . . . we look . . . to the percentage of business controlled, the strength of the remaining competition . . . and other characteristics of the market.")

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgments and opinion of the Court of Appeals for the Seventh Circuit.

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Petitioners respectfully submit that respondent's attack on the amicus brief of the United States is unsound in fact, law and policy and underscores the need for review of the intra-enterprise conspiracy doctrine by this Court.

First, respondent is unable to escape the serious conflicts among the circuits and the grave uncertainty among the bar and business community created by the intra-enterprise conspiracy doctrine. Only recently, still another lower court has emphasized that "the Circuit Courts, no doubt prompted by criticism of the doctrine by learned commentators, *see, e.g.*, P. Areeda, *Antitrust Analysis* ¶ 334 (3d ed. 1981), have developed numerous exceptions to the general rule." *In re Mid-Atlantic Toyota Antitrust Litigation*, 1983-1 Trade Cas. ¶ 65,304 (D. Md. 1983) at p. 69,792 n.12. (*See also* Pet. at 10) The resulting confusion is brought home by respondent's failure even to attempt to reconcile the test applied below with the

far different "holding out as competitors" test invoked by the Seventh Circuit in the more recent case of *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983), discussed in our Reply.[1] Respondent also attempts no answer to the views of the other amici that the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations." (Amicus Br. of National Association of Manufacturers, p. 3) The continuing flow of irreconcilable lower court decisions and the practical concerns uniformly voiced by the government and the other amici clearly justify a review of the intra-enterprise conspiracy issue by this Court.

Second, respondent's suggestion that the government has changed its position confuses statements by prior Department of Justice officials of what the law *appeared to be* with what they believed it *should be*. For example, respondent's assertion that Assistant Attorney General Turner "unequivocally" endorsed the doctrine ignores his statement immediately preceding the language quoted in respondent's brief that:

> "We certainly don't generally favor a bathtub conspiracy charge and, in fact, it is not the happiest of legal doctrines in any context." 34 ABA Antitrust L.J. 113, 122-23 (1967).

Respondent is unable to cite a single case in the last fifteen years in which the government has brought suit alleging

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[1] Similarly, a panel of the Fifth Circuit in *J. T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 795 (1983) recently held that "an important element in this capacity to conspire has been that the separate corporations be in the position of competitors." In adopting this approach, the panel failed to follow that Circuit's prior rule that separately incorporated entities are always capable of conspiring for purposes of Section 1. *See H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978).

that a parent and wholly-owned subsidiary alone provided the requisite plurality of actors for Section 1 purposes.[2] Further, respondent overlooks that the only consensus achieved in the Report of the Attorney General's Committee was that "[i]t is obviously unrealistic to expect or command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart,* or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (Report at 36)

Third, respondent is wrong that the government's arguments are at odds with sound antitrust doctrine. As the court of appeals emphasized below, academic commentators have been "almost uniformly critical" of the doctrine because of its untoward effects on business decisionmaking and antitrust counseling. The recent and exhaustive critique by Handler and Smart is typical, concluding that "[w]hen analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept." (Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine,* 3 Cardozo L. Rev. 23, 24 (1981)) *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act,* 95 Harv. L. Rev. 661, 681 (1982) (antitrust goals "would be best served by a [Supreme] Court ruling that related corporations are legally incapable of conspiring among themselves in violation of section 1").

Fourth, respondent misreads the law when it challenges the government's distinction between Sections 1 and 2, and the effect that distinction should have on the intra-enterprise conspiracy doctrine. As the government correctly stresses,

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[2]The recent government cases cited at page 5 of respondent's supplemental brief are not to the contrary. These cases involved conspiracies between affiliated corporations and third parties. Respondent acknowledges that a corporation and its employees cannot alone violate Section 1 of the Sherman Act but may be separately liable if they conspire with third parties; the cases cited by respondent simply apply this same principle in a parent-subsidiary context.

the doctrine is "at odds with the system of distinct standards Congress has created under the Sherman Act," because "it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form." (Br. 3, 6) The courts, in their treatment of the doctrine, have likewise stressed that "Congress has distinguished courses of conduct which are illegal when undertaken by a plurality of actors from those which are illegal when undertaken by a single entity" and that "[t]o impose section 1 liability on what in reality constitutes a single economic enterprise would imprudently blur this purposeful distinction." *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981). Precisely the same point is made by the commentators. *E.g.*, Areeda, *Antitrust Analysis* ¶ 334 at 401 (3d ed. 1981) (the doctrine "invites the inappropriate or even irrelevant application of substantive rules designed to deal with cartel or other truly conspiratorial behavior").

Fifth, respondent is incorrect in asserting that the government's legal control test would require this Court to "determine antitrust policy on the basis of paper ownership rather than economic realities." (Supp. Br. 11) The government's reliance on "ownership as the determinant of control" is firmly grounded in the economic principle that, where a subsidiary is wholly owned, there is a complete unity of legal and economic interests and the parent and subsidiary constitute a single economic enterprise. This view is consistent with corporate law and antitrust policy generally. (*See* Pet. at 21)

In sum, the United States is plainly correct in urging that a reassessment of the intra-enterprise conspiracy doctrine is now "appropriate" and that this case presents the "proper vehicle" for the Court to hold that "when common control of two corporations is itself lawful under the antitrust laws, the mere fact that those corporations coordinate their activities will not form the basis for finding concerted action in violation of Section 1 of the Sherman Act." (Br. 22-23)

Conclusion

A writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals for the Seventh Circuit.

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Dated: June 14, 1983

82-1260

No.

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CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

APPENDIX

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APPENDIX A

APPENDIX A

IN THE

United States Court of Appeals

For the Seventh Circuit

Nos. 81-2009 and 81-2148

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,

vs.

COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,

vs.

DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201—**Hubert L. Will**, *Judge.*

Argued March 31, 1982—Decided October 1, 1982

Before CUMMINGS, *Chief Judge,* NICHOLS, *Circuit Judge,** and CUDAHY, Circuit Judge.

CUMMINGS, *Chief Judge.* In appeal No. 81-2009 Copperweld Corporation (Copperweld) and Regal Tube Company (Regal)

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* Judge Nichols was an Associate Judge of the United States Court of Claims when this case was argued. He was sitting by designation. On October 1, 1982, he became a member of the newly created United States Court of Appeals for the Federal Circuit, with the title of Circuit Judge, by various provisions of Pub. L. No. 97-164.

challenge a jury verdict that they conspired against Independence Tube Company (Independence) in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) and that Copperweld induced the Yoder Company (Yoder) to breach a contract with Independence. The jury also found that Regal (but not Copperweld) slandered Independence and wrongfully interfered with the business relationships of Independence and one of its customers. The jury assessed damages of $2,499,009 against Copperweld and Regal jointly and severally for the antitrust and inducement violation (trebled to $7,497,027) and $15,000 against Regal alone for the pendent tortious interference and slander claims. It also awarded Independence attorney's fees and costs in amounts determined later.[1]

Appeal No. 81-2148 addresses the propriety of the district judge's decision to direct a verdict against Regal and Copperweld on their counterclaims against Independence and its President, David F. Grohne. Regal and Copperweld had argued that Independence competed unfairly with them and that Grohne had breached his fiduciary obligations to Regal, his former employer, by luring away key Regal employees and by wrongfully using Regal know-how and technical information.

We affirm the judgment below in all respects.

I. EVENTS LEADING TO THIS LITIGATION

Regal began its existence in 1955 as a Chicago firm that manufactured steel tubing for use in heavy equipment, cargo

[1] After the oral argument in this case, Judge Will entered judgment on plaintiffs attorney fee and cost claims under 15 U.S.C. § 15. An appeal from that decision has now been docketed in this Court (No. 82-2183). Although it is our general practice to consolidate merits and fee appeals, we see no purpose in delaying the resolution of the merits case here. The fee appeal will be assigned to a randomly selected panel of this Court according to our usual procedures.

vehicles, and construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C.E. Robinson Company headed by a gentleman bearing that name; in 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc., a California-based manufacturing concern. David Grohne came to Regal in 1959, rose to become its Vice President and General Manager by 1968, and stayed on as President of the division after Regal was sold to Lear Siegler.

In 1972 Copperweld purchased the Regal division from Lear Siegler for Regal's book value plus $3 million. The sale agreement bound Lear Siegler not to compete with Regal, or to allow any subsidiary it controlled to do so, anywhere in the United States for five years. After the sale Copperweld transferred all Regal's assets to a newly formed Pennsylvania corporation again named Regal Tube Company. Thus Regal was once again a corporation, rather than a division, but it was wholly owned by Copperweld. It continued to conduct all its manufacturing operations in Chicago, although it shared corporate headquarters in Pittsburgh with Copperweld.

As the sale of Regal to Copperweld was being negotiated, David Grohne was considering his options. By the time the sale was consummated, Grohne had accepted a job as Lear Siegler's Corporate Secretary, a position he held from February to July 1972. From July to September he continued to work for Lear Siegler, finishing various projects. Throughout this period, Grohne was also actively pursuing the possibility of establishing his own steel tubing business. In the spring of 1972 he presented a financing proposal to the Continental Illinois National Bank in Chicago and lined up several dozen investors. In May 1972 Independence was incorporated and sought bids on tubing mills from manufacturers. By late October Independence had a firm offer from Yoder of Cleveland, Ohio, and in December 1972 it gave Yoder a purchase order which called for the delivery of the mill by the end of December 1973.

Bedford Foster, Regal's General Manager, and Phillip Smith, Copperweld's Chairman and Chief Executive Officer, learned of Grohne's plans in the winter of 1972-1973. Their first thought was that the non-competition agreement Lear Siegler had signed when it sold Regal ought to prevent Grohne's entrepreneurial efforts. Defendants' lawyer, however, advised them that it did not, though he thought it might be possible to obtain an injunction against Grohne's activities if and when he made use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," all of which Copperweld had purchased from Lear Siegler. In February 1973 the lawyer furnished Smith and Foster with a letter to be sent to anybody with whom Grohne tried to deal. The letter warned that Copperweld was "greatly concerned if [Grohne] contemplates entering the structural tube market • • • in competition with Regal Tube" and vowed to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler."

Copperweld's stated rationale for this letter was to prevent third parties from developing reliance interests in dealings with Grohne that might later make a court reluctant to enjoin Grohne's activities at Copperweld's behest. Its actual effect was much simpler: it made Yoder, which had accepted Grohne's purchase order for the tube mill on February 19, 1973, void the acceptance two days later, when it received Copperweld's February 19th missive. Despite Independence's efforts to piece the Yoder deal back together again, Yoder made a final decision to cancel in March 1973. Thereafter Independence opened negotiations with Abbey Etna Machine Company, which finally agreed to ship Independence the necessary tube mill between April and September 1974. Although Abbey also received one of Copperweld's warning letters, it performed its agreement with Grohne. Independence Tube Corporation commenced operations on September 13, 1974—nine months later than it could

have if Yoder had delivered the tube mill as originally agreed.

Among the employees of Independence were eight former employees of Regal, whom Grohne hired after he had a commitment from Abbey and before Independence actually commenced business. Zbigniew Uzarowicz, Regal's plant manager, joined Independence in October 1973. Antanas Janonis, Regal's plant engineer, also went to Independence soon thereafter. Grohne subsequently hired six additional Regal employees—a vice president, two plant foremen, the office manager, a regional sales manager, and a salesperson. Regal and Copperweld viewed Grohne's recruitment as posing two threats: luring away key Regal employees and obtaining Regal's proprietary information and know-how from them.

In 1976 Independence filed this suit in federal district court in Chicago against Copperweld, Phillip H. Smith, its Chief Executive Officer, Regal and Yoder. Its amended complaint of May 24, 1977, charged that

> (1) Copperweld, Regal, Smith, and Yoder had conspired to restrain trade in the market for steel structural tubing, in violation of Section 1 of the Sherman Act (Count I);
>
> (2) Copperweld, Regal, and Smith had attempted to monopolize the market for steel tubing, in violation of Section 2 of the Sherman Act (Count II);
>
> (3) Yoder had breached its contract to supply a tube mill to Independence (Count III);
>
> (4) Copperweld, Regal, and Smith had interfered with Independence's contractual relationship with Yoder and business relationship with Deere Plow & Planter Works (Deere) (Count IV); and
>
> (5) Copperweld, Regal, and Smith had slandered and libeled Independence with Deere (Count V).

Count VI sought compensatory and punitive damages under all the above theories and preliminary and permanent injunctive relief.

Copperweld and Regal denied all Independence's allegations, set forth various affirmative defenses, and filed discursive counterclaims against Independence and Grohne. The defendants alleged that

> (1) Independence and Grohne used Regal's protectible know-how and confidential or proprietary information in violation of the Lear Siegler ageement and in breach of Grohne's fiduciary duties to Regal;
>
> (2) Independence and Grohne competed unfairly by hiring away key Regal employees; and
>
> (3) Independence and Grohne interfered with prospective contractual and other business relationships of the defendants by filing their lawsuit on the eve of a $30 million debenture offering by Copperweld.

Like the plaintiff, the defendants sought compensatory and punitive damages and preliminary and permanent injunctive relief.

Before trial Independence dismissed its monopolization claim (Count II supra). It also dropped Smith as an individual defendant in all the counts in which he had figured.

The liability portion of the case was tried to a jury between November 14, 1980, and February 20, 1981. At the conclusion of the evidence Judge Will directed a verdict against Regal and Copperweld on the issues raised by their counterclaims. The remainder of the case went to the jury on special interrogatories. The jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act, but that Yoder had not been involved in the conspiracy (Count I). It also found Yoder liable for breach of its contract to supply a mill to Independence (Count III). The jury found that Copperweld (but not Regal) had interfered with Independence's contractual relationship with Yoder (Count

IV); and that Regal (but not Copperweld) had interferred with Independence's business relationship with Deere (Count IV) and had slandered Independence to Deere (Count V).

The damages phase of the trial was concluded on March 6, 1981. Yoder was no longer a party, having settled its liability to Independence under Count III. Judge Will instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach (Counts I and IV) should be identical and therefore should not be double-counted. The jury then awarded $2,499,009 (trebled to $7,497,027) on the antitrust claim against Copperweld and Regal, and $15,000 against Regal alone on Counts IV and V. Judgment was entered on May 27, 1981. On June 22, 1981, Judge Will handed down a 65-page memorandum opinion denying the defendants' motions for judgment notwithstanding the verdict or a new trial. These appeals followed.

II. ARGUMENTS RAISED ON APPEAL

The defendants raise a host of challenges to the trial results. They fall into three general categories.

A. The Antitrust Liability

The defendants argue that they could not as a matter of law have conspired to violate Section 1 of the Sherman Act, because they are not sufficiently distinct entities under our decision in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), certiorari denied, 445 U.S. 917. They also argue that the evidence was insufficient to prove that Regal entered into a conspiracy with Copperweld as of the sending of their lawyer's February 19, 1973 warning letter to Yoder, and that evidence of Regal's and Copperweld's conduct after that date was improperly admitted. Finally, the defendants argue that the plaintiff's failure to demonstrate harm to competition vitiates the judgment either because no antitrust injury was shown (as required by *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477), or because the appropriate Rule of Reason inquiry was never undertaken.

B. The Pendent State Law Claim

Copperweld maintains that the separate tortious interference with Yoder judgment cannot stand because Copperweld was legally privileged to take the actions it did to protect its interests. Copperweld contends that its privilege argument went unrebutted by Independence, and that the district judge erred in not instructing the jury on the claimed privilege.

C. The Directed Verdict on Defendants' Counterclaims

The defendants argue that they presented enough evidence to warrant sending their counterclaims to the jury. In the alternative they argue that the district judge's exclusion of proffered evidence in support of the counterclaims was error and requires a new trial.

D. Computation of Damages

The defendants argue that Independence's damage theory was based on methodologically flawed testimony of an unqualified expert and on unsubstantiated opinions and assumptions. They also claim to have been prejudiced by the district judge's instruction on the congruence in this case between antitrust and tortious interference damages.

III. THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE

A. Background: The Emergence of the *Photovest* Test

It is elementary that a conspiracy in violation of Section 1 of the Sherman Act, like any other kind of conspiracy, requires an agreement by two or more parties. When this case went to the jury, it could have been a garden-variety antitrust conspiracy case—Copperweld and Regal on the one hand agreeing with Yoder on the other to keep Independence out of the steel tube business. But the jury exonerated Yoder (except on the breach of contract Count III against Yoder) and instead found a conspiracy between Copperweld and its wholly-owned subsidiary Regal. As a result, it set the stage for appellants' broadly based attack on the intra-enterprise

conspiracy doctrine in the abstract and as applied to these facts.

We may begin with antithetical truisms. Two independent corporations can engage in concerted activity that violates Section 1 of the Sherman Act. A corporation and its officers, or a corporation and one of its fully integrated divisions cannot, because the requisite plurality of actors is missing. The hard case lies between these opposites: can a corporation conspire with its wholly-owned subsidiary? In a purely formal sense, the answer should be yes: there are two corporations and hence two actors. But as a practical matter there may be little difference between a wholly-owned subsidiary and a fully integrated division, and where the differences are trivial Section 1 liability should not turn on them.

Academic discussion of the intra-enterprise conspiracy[2] doctrine is almost uniformly critical.[3] The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value.[4] They also point out that government enforcement agencies do not use the doctrine.[5] Rather it surfaces in

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[2] Although the terminology is used variously, we adopt "intra-enterprise conspiracy" for the parent-subsidiary model and reserve "intracorporate conspiracy" for the situation where a division is alleged to have conspired with its own corporation.

[3] See, *e.g.*, Handler and Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981), especially the bibliography at 23, n. 3; and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982). Handler and Smart remark that "[i]t is a doctrine with numerous critics and few friends," *op. cit.* at 23.

[4] See *e.g.*, Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 718-727 (1977).

[5] *Id.* at 729. Note, however, that the Report of the Attorney General's National Committee to Study the Antitrust Laws 34-35

(footnote continued on next page)

private suits—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies.[6] Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed,[7] and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal.

Judicial attitudes toward the intra-enterprise conspiracy doctrine are more constrained. For a federal judge at the trial or appellate level, the salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored.[8] It is no ac-

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(1955) would differentiate between parent-subsidiary pricing or distribution decisions (no liability) and agreements that have a "coercive [effect on] the trade of strangers to the corporate family" (liability). This case falls in the latter category. See also Section of Antitrust Law of the American Bar Ass'n, Antitrust Developments 1955-1968, at 19-22 (1968).

[6] Handler and Smart, *op. cit.* (note 3 *supra*) at 25.

[7] Economies of scale are the main reason for integration, whether it is full or partial. The choice between partial integration (the parent and its wholly-owned subsidiary) and full integration (the corporation and its divisions) may be dictated by a desire to (1) save taxes (not a "real" efficiency), (2) maintain the good will associated with the subsidiary, (3) have some decentralization of production, distribution or management, (4) enhance a particular part of the enterprise in capital markets, or (5) minimize the effect of protective legislation against foreign corporations. See 75 Mich. L. Rev. at 728 & n. 71.

[8] *E.g.*, *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227: "[T]he common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy

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cident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the capacity to conspire, whether or not they can be found to have done so in a particular case.[9] Among the circuits there have been various limiting approaches—but no move to abolish the doctrine root and branch.

This Circuit's position has recently been articulated in *Photovest Corp., supra*, 606 F.2d 704, 725-727. Like the Eighth and the Ninth Circuits,[10] we focus on the practical relationship between the parent and the subsidiary, using a variety of factors to decide when there is enough separation between the two entities to make treating them as two independent actors sensible. The test is admittedly in an early and unsettled stage of development, as is inevitable with: (a) any

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from the impact of the [Sherman] Act." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215: "[The] suggestion [that their status as a single business unit makes them incapable of conspiring] runs counter to our past decisions that common control and ownership does not liberate corporations from the impact of the antitrust laws." *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598: "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142: "[S]ince respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."

[9] See the survey in Handler and Smart, *op. cit.* (note 3 *supra*) at 40-61. The author of 95 Harv. L. Rev. 661 (note 3 *supra*) concedes (at 676) that "Supreme Court precedent precludes the lower courts from considering * * * if concerted action by related corporations should *ever* be considered a conspiracy under section 1" (emphasis added).

[10] See, *e.g.*, *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), certiorari denied, 433 U.S. 910.

test that involves the presence or absence of various unranked factors, (b) the possibility that the list will expand or contract, and (c) as yet limited application. Nonetheless, we think it focuses on the proper question—namely, when the distinction between affiliation and integration is trivial and when it is significant. And it seeks the answer to the question in terms of evidence that is empirical, readily furnished, and amenable to development at trial—as more arcane economic calculations are not. Its flexibility means that it can mediate between the corner positions of academic critics on the one hand and sweeping Supreme Court dicta on the other. And the uncertainties that necessarily exist now will be obviated as the test is applied and refined.

In short, *Photovest* represents a reasonable and pragmatic approach to the intra-enterprise conspiracy problem, and we intend in what follows to adhere to it.

B. *Photovest* Applied

Copperweld and Regal have two quarrels with the application of the *Photovest* criteria to this case. One centers on the instructions which the trial judge gave, and their failure to correspond exactly to the *Photovest* language. The second involves the sufficiency of the evidence, assuming that the instructions were substantially correct.

There is some dispute about whether the instruction issue has been preserved on appeal,[11] but we conclude that it is properly before us.[12] The defendants first criticize the in-

[11] Independence contends that Copperweld's and Regal's trial attorneys (who are not representing them in the appeal) acquiesced in all the instructions to which objection is now made (Br. 33-37). The effect of such acquiescence under Rule 51 of the Federal Rules of Civil Procedure would be to remove from our consideration any error in the jury charge that was not "plain error [resulting] in a miscarriage of justice." 5A *Moore's Federal Practice* ¶ 51.04, esp. 51-15 (1982).

[12] Judge Will's post-trial order (App. 228-293, esp. 240-243) dealt extensively with the claimed instructional defects—an indication

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structions for failing to duplicate the *Photovest* factors verbatim (Br. 32-33). Yet *Photovest* itself, as Judge Will noted (App. 242), does not make its factors canonical.

> [W]e must decide each case on its particular facts. Some relevant factors to consider include "the extent of the integration of ownership, whether the two corporations have separate managerial staffs, . . . the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, their history, whether they functioned as separate firms before being partially integrated, and finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.

606 F.2d at 726, quoting L. Sullivan, *Handbook of the Law of Antitrust* 328 (1977). There can be no claim, based on the language of *Photovest,* that this Court's *ipsissima verba* are necessary.

The more substantial issue is whether the instructions Judge Will did give [set out at App. 240-241] are consistent with the analysis undertaken in *Photovest.* That they are is convincingly shown in the Appendix to this opinion, where the instructions and the critical paragraphs of the *Photovest* opinion are juxtaposed. Moreover the judge's charge emphasized to the jury that they were looking for real, rather than merely formal, distinctness:

> The rule is that a parent like Copperweld and a subsidiary like Regal are capable of combining or conspiring together unless they are operated in such a way as to, in effect, constitute just one company.
>
> • • • •

(footnote continued from preceding page)

that the defendants' objections were sufficient. This same issue recurs elsewhere in this appeal, and we have generally resolved ambiguities in defendants' favor. See *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247, 255-256.

> If you find from the evidence that Regal Tube Company is not sufficiently distinct from Copperweld as an economic entity, then you must consider them as a single person • • •.
>
> [App. 156, 158; these statements immediately precede and follow the 9 specific capacity instructions.]

Despite this congruence with *Photovest's* approach, the defendants claim to have been prejudiced by particular instructions or phrases within instructions.[13] In view of the overall emphasis, there is no realistic possibility that the jury could have singled out any one factor—or part of a factor—to the exclusion of all the others. Furthermore, the defendants exhibit some confusion about how a balancing test works. *Photovest* took a variety of considerations and weighed them, and the balance in *Photovest* tipped in one direction. That does not mean that in all future cases the factors on the lighter side of the scale must be excluded. They may again turn out not to be probative, but it is not legal error to consider them. Of course, once a body of law accumulates, a court may redefine its balancing test or substitute a bright-line rule, based on its experience. We are not yet in a position to do that.

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[13] For example, the reference to "separate bank accounts" and "separate records" (#7) though "[o]stensibly neutral, • • • is actually heavily weighted against defendants" (Br. 34). "Item 8 [whether both companies were separate participants in the alleged unlawful activity] • • • invited the jury to find capacity on the ground that employees of both Copperweld and Regal were allegedly active" (*id.*). The reference to "day-to-day operations" (actually the instruction mentioned both day-to-day and policy decisions) is "rightly disregarded [in *Photovest*] as an irrelevant factor (*id.*). Finally, the invitation to consider "any other facts" relevant to capacity is considered authorization for "the jury to substitute its own notions about capacity for the standards set by this Court." (*Id.* at 35).

Our holdings so far—that *Photovest* governs this Circuit's treatment of intra-enterprise conspiracy and that Judge Will's instructions comport with *Photovest*—are virtually dispositive of the defendants' challenge to the jury's finding of capacity to conspire. Jury factfinding, unlike judicial factfinding, is not subject to direct attack as "clearly erroneous." In view of the Seventh Amendment's prohibition ("no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law"), a jury verdict can only be set aside if the "evidence [viewed] in the light most favorable to the plaintiff and • • • [the] facts and inferences reasonably drawn from the facts • • • lead to but one conclusion—that there is a total failure of evidence to prove the plaintiff's case." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1064 (1st Cir. 1980), vacated on other grounds, 453 U.S. 247.[14] It is particularly appropriate to

> "give [the plaintiff] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 • • •, in complex antitrust cases • • • "where motive and

[14] This is the standard for directing a verdict [i.e., removing a case from the jury] and for entering judgment notwithstanding the verdict [i.e., overriding the jury's decision], *Fact Concerts, supra*, 626 F.2d at 1064, vacated *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247; 5A *Moore's Federal Practice* ¶ 50.07[2] at 50-76 to 50-83 (1982). It is also the standard for appellate review, 5A *Moore's Federal Practice* ¶ 50.07[2] at 50-83; cf. *Gray* v. *General Motors Corp.*, 434 F.2d 110 (8th Cir. 1970).

The standard for granting a new trial is broader (a partial catalog of permissible reasons appears in 6A *Moore's Federal Practice* ¶ 59.08[1] (1982)) because any retrial is also to a jury and because such judicial control over jury verdict had existed at common law, *id.*, ¶ 59.04[2]. But appellate review is limited to abuse of discretion. Here the district court's denial of the new trial motion is before us because it is merged with the final judgment, but we find no abuse of discretion.

> intent play leading roles," *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 • • •, because "[f]indings as to the design, motive and intent with which men act depend peculiarily upon the credit given to witnesses" by the trier of fact. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 • • •.
>
> *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978).

The issue here–how much separation Regal and Copperweld in fact maintained in the conduct of their business—is similarly fact-bound and inferential.

The plaintiffs presented evidence from which the jury could have found that

> (1) Regal had existed as a division of C.E. Robinson Company and of Lear Siegler before its acquisition by Copperweld, and that Copperweld intended Regal to "keep its ongoing business and keep serving the market and customers it was already serving" (testimony of Smith, T. 3031).
>
> (2) The acquisition of Regal did not have the practical effect of enabling Copperweld to handle additional steps in its own manufacturing process (comparable to the forward integration found in *Photovest*), but established Copperweld in an entirely new line (testimony of Smith, Tr. 3029).
>
> (3) Regal management had real autonomy in both day-to-day and policy decisions (Smith testimony, App. 708-710; Foster affidavit, App. 647).
>
> (4) Not only were Regal's expenses and revenues segregated (Smith testimony, App. 708-710) but Regal's operating manager's compensation was based primarily on Regal profitability (Breedlove, Tr. 4934-35, 4937, 4958).

(5) Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials (App. 361-376 (sales); App. 305-308, 1054-1056 (suppliers))—a fact relevant to the ability of the defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division (Indep. Br. 31-32).

Taken together this information creates a much fuller and more consistent picture than did the two "isolated [distinct entity] statement[s]" in *Photovest*, 606 F.2d at 727, the same record on which a jury verdict of conspiracy was overturned in *Ogilvie* v. *Fotomat*, 641 F.2d 581, 589-590 and n. 27 (8th Cir. 1981). The jury here was entitled to conclude that Regal was not "merely a service arm of [its parent], more like a corporate division than a separate corporate entity," *Photovest*, 606 F.2d at 727.

C. Defendants' Other Claims of Error under the Sherman Act Count

1. *The existence of a conspiracy.*

The defendants argue that even if the capacity hurdle was overcome, no conspiracy was proven. Their initial objection, that the proof was circumstantial rather than direct (Br. 36), is meritless: conspiracies are by their nature not subject to direct proof. Furthermore, *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), certiorari denied, 102 S. Ct. 1610, does not state a proof requirement for all conspiracies, but a method of dealing with those in which an agreement is inferred on the basis of "conscious parallelism" among the co-conspirators. This is not a "conscious parallelism" case.

The defendants also argue that the evidence of Foster's and Smith's conduct up until February 19, 1973 (the date on which the letter to Yoder was mailed) was insufficient, and that evidence of their later activities—which tended to cast a

more sinister light on their doings—was improperly admitted. This argument rests on a fundamental misunderstanding about the conspiracy alleged: Independence's contention was that Copperweld Chairman Smith and Regal General Manager Foster had engaged in a continuing course of anticompetitive conduct, but the only actual harm they had been able to cause was Yoder's cancellation of the tubing mill contract.[15] The other recipients of the warning letters—including Abbey-Etna, Continental Illinois National Bank, First National Bank of Chicago, C.E. Robinson, various real estate firms, and major steel suppliers (App. 84, 239)—did nothing that was productive from Copperweld's and Regal's perspective, or detrimental from Independence's. The only other instance of tangible harm to Independence—the defamatory remarks to Deere—was unrelated to the letter-writing campaign. We find that the evidence of a conspiracy (pre- and post-February 1973) was properly admitted and the jury's inferences from it are unassailable.

The defendants finally argue that Judge Will made inconsistent legal rulings when he found that Regal could not be held liable as a joint-tortfeasor with Copperweld for inducing Yoder's breach of contract, but did not also rule that Regal

[15] The situation is thus not similar to, and there was no error in Judge Will's different treatment of, Yoder's breach of the tubing mill contract (Def. Br. 43, n. 15). Judge Will refused to admit defendants' evidence about Yoder's state of mind in May 1973 on the issue of what Yoder did, or why, in February of that year. The only questions relevant to Yoder's breach of contract (a more discrete event than a conspiracy) were those contemplated in the Uniform Commercial Code: (1) whether a contract had been formed, an issue Judge Will resolved as a matter of law; (2) whether Yoder became insecure after receiving the Copperweld letter, sought assurances from Independence, and did not receive them (UCC 2-609); and (3) whether Grohne failed in his duty to disclose to Yoder the existence of basic facts (UCC 1-203, 2-302). The defendants' proffered evidence was not relevant to any of the dispositive questions.

could not be Copperweld's co-conspirator. (Br. 40-42). This argument overlooks important substantive differences between tort and conspiracy liability, as Judge Will pointed out (App. 234-235). To be liable for tortious interference with contract, Regal would have had to know that the Independence-Yoder contract existed, and would have had to do a specific act to cause the breach of contract. *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 291 (7th Cir. 1969), certiorari denied, 396 U.S. 902. In other words, to be a joint tortfeasor, Regal had to have causal responsibility for the breach. To be liable for damages caused by the breach under the antitrust conspiracy theory, Regal had only to have entered into an agreement to hamper Independence's entry into the market and have taken some step toward that end. Once that showing was made, Regal could be liable for any actions of Copperweld in furtherance of the conspiracy, on the theory that for the duration of the conspiracy conspirators are accountable for each other's actions. *T.V. Signal Co. of Aberdeen* v. *American Telephone & Telegraph*, 462 F.2d 1256 (8th Cir. 1972). Section 1 of the Sherman Act casts a wider net than do principles of common-law tort liability.

2. *The failure to demonstrate anticompetitive effect.*

Defendants argue that Independence has failed to make out "antitrust injury," as that term is used in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (Br. 44).[16] *Brunswick* defines antitrust injury as

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of an-

[16] Independence's suit is a far cry from the curious allegations in *Brunswick*. There the antitrust plaintiffs argued that Brunswick, by taking over the operation of financially shaky bowling alleys rather than allowing them to fold, had deprived plaintiffs of the profits they could have earned if the bowling-alley market had been less competitive.

> ticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. at 125.

If "antitrust injury" inquires into causation, the injury Independence claimed flowed directly from the defendants' conspiracy to keep it from going into business as their competitor, a clear violation of Section 1 of the Sherman Act. If "antitrust injury" also states a limitation on damages, as is argued in Page, *Antitrust Injury and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980), it equally supports Independence's recovery here:

> The traditional measures of damages for the total exclusion[17] of a competitor from the market accurately reflect antitrust injury. [If] a potential competitor is denied entry to a market because of the existing competitors' control of a necessary facility or resource[18] • • • damages [should reflect] returns on the output that the market would have supported but for the collective impediment to new entry.
>
> Page, *op. cit., supra*, 485-486.

Defendants also argue that the district court should have required Independence to show anticompetitive harm by demonstrating that Regal's market share increased after the allegedly anticompetitive conduct. This showing, they argue, is mandated by our decision in *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980) (Br. 45-50).

Defendants misread *Havoco*. Its main message is that outside the limited category of *per se* violations of the anti-

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[17] Here the exclusion was total, but for a limited time.

[18] Here the necessary facility or resource was the steel tubing mill, which the defendants persuaded Yoder not to supply. See the discussion of damages, Part V *infra*.

trust laws[19] actual harm to competition must be demonstrated under the Rule of Reason analysis before an offense against the antitrust laws will be made out. That proposition was recognized by the district judge here, and he so instructed the jury (App. 162-164):[20]

> Independence must establish by a preponderance of the evidence that the delay in its entering into business resulted in a decreased supply or higher prevailing prices in the market or otherwise adversely affected competition in the relevant market (App. 164).

Havoco does not say that harm in the relevant market is demonstrable only by market share evidence, but rather that the relevant market must be defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown. 626 F.2d at 558. Here the jury was instructed that

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[19] There is some sentiment in the scholarly commentary that all antitrust violations involving a parent and a subsidiary as conspirators should be subject to Rule of Reason analysis, even where the conduct at issue (*e.g.*, price-fixing, certain boycotts, certain tying arrangements) would otherwise be classified *per se* violation. See, *e.g.*, Comment, *Corporate Liability for Intra-Corporate Conspiracy in Restraint of Trade*, 1968 U. Ill. L. F. 248, 253. That approach is certainly salutary where the capacity to conspire is presumed on the strength of formally separate corporate identities. We have not yet had sufficient experience with *Photovest's* more pragmatic approach to the capacity problem to know whether the Rule of Reason is also needed here as a prophylactic against unduly expansive antitrust liability. This case was not decided on a *per se* basis.

[20] Contrary to the impression in Defendants' Brief (46-47) Judge Will's "impatient" remarks quoted there did not "forbid" closing argument and instructions on market share. The issue was the admissibility of a summary exhibit (prepared by the defendants' trial counsel), and Judge Will was speaking out of the jury's presence (Indep. Br. 51-52). Defendants did present evidence about market share, so that the summary exhibit would have been, at best, cumulative (App. 258-259).

the relevant market was the area "in which [Independence] and the defendant Regal operate and to which purchasers can practicably turn for supplies of structural steel tubing or any substitutable products." This definition precludes any facile equation of harm to Independence and harm to competition.

Defendants also seem to cite *Havoco* for the proposition that Independence must fail under a Rule of Reason analysis unless it can demonstrate that Regal's market share increased as a result of Independence's foreclosure from the market (Br. 48-49). However true that proposition may be when an actual competitor is harmed or driven out of business,[21] it makes no sense in a foreclosure case. Here by contrast it would be an anticompetitive sign if Regal could maintain its market share so long as Independence was kept out of the steel tubing business, but lost ground to independence once the latter began production. That was, as defendants concede (Br. 49), exactly what the evidence suggested.[22]

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[21] The cases on which the defendants rely are of this type: *Havoco, supra* (actual competitor allegedly harmed); *Kaplan* v. *Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), certiorari denied, 447 U.S. 924 (actual competitor allegedly driven out of business); *Northwest Power Products, Inc.* v. *Omark Industries*, 576 F.2d 83 (5th Cir. 1978), certiorari denied, 439 U.S. 1116 (terminated distributor claiming *per se* violation of antitrust laws). In these circumstances before-and-after market share figures will give some indication whether the antitrust plaintiff is simply an inefficient firm whose place has been taken by a more efficient one or whether the relevant market is becoming less competitive.

[22] There was accordingly no error, even if defendants preserved their objections to the instructions (cf. Independence Br. 52 and App. 258-261 with notes 11 and 12 *supra*) and were deterred by Judge Will's remarks from arguing their theory in closing, since their theory was wrong in these circumstances.

IV. THE STATE LAW ISSUES

A. Plaintiff's Pendent State Claims

Having affirmed the judgment for Independence on its antitrust claim, we would ordinarily not need to discuss at length the defendants' attack on the alternative tortious inducement of a breach of the Yoder contract (Count IV).[23] But one point requires some attention. Copperweld claims a privilege to interfere with the Yoder contract to protect its own legal interests. At trial, the privilege figured in both the antitrust count (where it was alleged to come within the *Noerr-Pennington* doctrine)[24] and the tortious interference with Yoder count. On appeal, the *Noerr-Pennington* doctrine has been abandoned, but Copperweld continues to insist with reference to the tort count that the privilege is unqualified, that showing the absence of the privilege was part of plaintiff's prima facie case, and that Judge Will did not give the jury proper instructions on it (Br. 50-58). Because there is a possibility that, had there been error, it could have affected the whole judgment, we address Copperweld's interpretation.

According to Copperweld (which alone was found liable for the tortious inducement of Yoder's contract breach), a belief that one has legal rights, however mistaken, can excuse any action, however disproportionate, to protect one's

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[23] Their claim that the instruction on the identity of damages under that count and the antitrust count prejudiced them is discussed in Part V *infra*. Defendants apparently do not contest bringing together Regal's liability for statements made to Deere and improper interference with Independence's and Deere's relationship.

[24] The doctrine takes its name from two Supreme Court cases: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657. It shields concerted efforts to influence public officials [including those in courts and administrative agencies] from antitrust liability. It does not shield all concerted activity that is allegedly taken with an eye toward litigation. See Judge Will's discussion, App. 237-240.

interests, however tenuous.[25] If this were a true statement of Illinois law, liability for tortious interference with a contract would be exceedingly rare.

Actually the Restatement (Second) of Torts, Section 733, on which Copperweld relies, states a more modest privilege:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Under this version the legally protected interest must exist at least in the abstract,[26] the assertion of it or the threat to enforce it must be made in good faith, the means chosen must be appropriate, and the claimant must believe that the

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[25] "The privilege [is] to take steps to safeguard one's own legal interests, even though they may interfere with another's contractual rights" (Def. Br. 51).

[26] Copperweld argues that *Hahn & Cady* v. *A.O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963), certiorari denied, 375 U.S. 944, and *Dinkins* v. *General Aniline & Film Corp.*, 214 F. Supp. 276, 280 (S.D.N.Y. 1962) show that the claimed legal right can be nonexistent. That is an overstatement of those cases. They indicate rather that the legal claim must be colorable, even if it is ultimately unsuccessful. In *Hahn & Clay*, Smith's employees had signed covenants not to use Smith's trade secrets. At the time Smith notified various people of its rights, its employees were working for Hahn & Clay and Hahn & Clay and Smith were bidding for the same contract. In *Dinkins* the employee was a former GAF president who had signed a contract with a non-compete term, but proposed to act as a consultant for GAF and one of its main competitors simultaneously. Thus in each case the privilege claimant could point to some specific source of his legal right. Copperweld's claimed rights are much vaguer and more conclusory.

contract or transaction, if allowed to go forward, would impair or destroy that right.

As a threshold matter, there was a general misunderstanding about the legally protectible interest. Copperweld knew from its first consultation with a lawyer that neither Grohne nor Independence was bound by the non-competition agreement it had signed with Lear Siegler when it bought Regal. Copperweld may have thought that Grohne owed certain duties to Regal because of his former employment and that these duties now ran to Copperweld as Regal's parent corporation. That is the basis of the counterclaims, discussed in Part IV.B *infra*. But if that is the legal interest, there is first no basis in fact for the assertion of it (see note 26 *supra*). Furthermore there is a complete lack of connection between that right and Copperweld's approach to Yoder. Grohne could buy a tube mill from a mill manufacturer without relying on Regal trade secrets, customer lists, or other proprietary information. Recognizing the discontinuity, Copperweld claims that it was protecting its right to enjoin Grohne, should he violate his fiduciary duties at some future time, by preventing third parties from developing reliance interests in Grohne's business. That theory improves the fit between the action and the rationale. But then the difficulty is that a preference for injunctive relief rather than monetary damages—when both are remote because the harm is neither actual nor imminent—can hardly qualify as a "legally protected interest."

In fact, Judge Will was probably more generous in instructing the jury on Copperweld's theory than he needed to be. Copperweld attempts to show otherwise by focusing solely on the instructions under the tort count (App. 181-183). But the district judge had already given the jury extensive instructions under the antitrust count (App. 164-169), and these were incorporated by reference, rather than fully

reiterated, under the tort count.[27] Reading the two sets of instructions together, we can see that the jury was told that: "preparing an injunction suit" was a "legitimate objective" (App. 165); such a lawsuit need not be filed to demonstrate a good faith intent to sue (App. 167); reliance on the advice of counsel was a factor but not a complete defense (App. 169); the actual existence of a legal basis for suit was irrelevant to good faith, but some quantum of investigation was required (App. 167); and Copperweld was entitled to be concerned about the formation of Independence as a competitor but its concern had to be focused on Independence, not translated into threats against parties with whom Independence dealt (App. 166). These instructions contain all that is correct in the defendants' proposed instruction:

> Under the law, a person may properly interfere with the contractual rights or business relations of another by in good faith asserting or threatening to protect a legally protected interest which he believes may otherwise be impaired or destroyed.
>
> If you find that Copperweld's letter of February 19, 1973, was sent on the advice of counsel in a good-faith effort to protect legal rights which Copperweld believed would otherwise have been impaired or destroyed, then you must find that the defendants are not liable on the plaintiff's tortious interference claim.
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> [Defendants' Instruction 39 Revised, Def. Br.54]

Unlike the defendants' instruction, Judge Will's did not eliminate the "reasonable means" requirement nor make the

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[27] App. 165: "[This issue] about the letters is in the antitrust claim and is applicable or involved in the later alleged improper inducement by Copperweld to Yoder to breach its contract with Independence." Cf. App. 181 (instructing on the tortious interference with Yoder count): "We have been through this, but I will repeat it here because it is relevant here." The jury had the instructions during its deliberations (App. 190) and could refer to both passages.

advice of counsel so prominent that the jury could be misled into according it conclusive importance.

Here as elsewhere in this appeal Copperweld's real complaint is that the jury disbelieved its version of events. As we have already indicated (pp. 14-16 *supra*), we do not substitute our judgment for the jury's. There was ample reason for its decision. For example, if notice rather than intimidation had been the purpose of Copperweld's campaign, one letter to Yoder would have served. A second and third were in fact sent (App. 593-594). If protection of Regal's proprietary interests had been the rationale, then Copperweld's actions were premature (App. 636, 638)[28] and probably specious (App. 760-777, 677).[29] We would therefore have affirmed the jury's findings if we had had to reach them on the antitrust appeal and we do affirm them on the tortious inducement of Yoder count.

B. Defendant's State-Law Counterclaims

Judge Will did not allow the issues raised in the defendants' counterclaims to go to the jury. Defendants argue that they presented enough evidence to avoid a directed verdict on several of the counterclaim issues and that a new trial is required. They apparently do not still main-

[28] See *e.g.* the advice from Copperweld's counsel (June 7, 1973) (App. 636): "[T]here is not much we can do until [Grohne] starts to operate or solicit customers, other than make known our intentions which has already been done. He should therefore be kept under continued surveillance and once he starts to operate or solicit customers we should pounce on him."

[29] App 760-777: May 5, 1974 letter to Copperweld from lawyer retained as expert in trade secret law, indicating that Regal had taken no steps whatsoever until then to give itself any protectible interest in its employees, its customer lists, or any other information. Cf. App. 677: General understanding in industry that manufacture of steel tubing involves no trade secrets, employees frequently change jobs among competing firms, and everybody knows who the buyers of steel tubing are.

tain that Independence hurt Copperweld's debenture offering.

It is by no means clear exactly what issues defendants' appealed counterclaims included. The defendants say that the counterclaims rested on "two theories: unfair competition and tortious inducement of employee" (Br. 60). They disclaim any reliance on trade secrets (Br. 61), but argue that "improper means used to gain information is a separate basis of liability, regardless of whether the information constitutes a technical trade secret in the narrow sense of the word," *Crocan Corp.* v. *Sheller-Globe Corp.*, 385 F. Supp. 251, 254-255 (N.D. Ill. 1974). The information must, they admit, be more than "purely public information" (Br. 62), but "internal business information, such as the financial, planning, design, and technical data involved here, cannot be taken by an employee without his [employer's] knowledge or consent and used in a competitive venture" (*id.*).

The thrust of defendants' claims seems to be that Grohne competed unfairly with Lear Siegler and (after the sale of Regal) with Copperweld by not telling them of his plans to form Independence (Br. 62-63) and that his hiring of "key" Regal employees was tortious either because it hurt Regal to lose them or because through them Grohne gained access to "internal business information" (Br. 63-64).

The first obstacle to defendants' theory is that it was established, and the defendants do not contest, that Grohne was not bound by the terms of the Lear Siegler-Copperweld contract not to form his own business. There is nothing sinister in his decision to do so, or in his not telling them of his plans at an early stage. The district court's exclusion of the testimony of Robert Campion, Lear Siegler's president, was obviously proper insofar as that testimony related to Grohne's "surreptitious conduct [and] his deception" or to Campion's conclusion that Grohne's activity demonstrated "a conflict of interest" (Def. Br. 64-65).

But the defendants also argue that Campion would have testified, if permitted, that Grohne took documents Campion considered confidential before he left Regal. Here it is hard to see that Mr. Campion's opinion had any relevance; one would expect Copperweld or Regal as counterplaintiffs to have to demonstrate continued confidentiality and harm to themselves, rather than rely on the statements of Regal's former owner's president. More important, there is no hint of the "improper means" that would extend trade secret protection to this category of information under *Crocan Corp., supra*,—unless it is Grohne's secrecy, in which case the agreement achieves perfect circularity.[30]

Under the tortious inducement or "employee piracy" (Reply Br. 24) theory, the focus wavers: sometimes defendants seem to be complaining about confidential information the employees brought with them to Independence (*e.g.*, Br. 63) and sometimes they concentrate on the value the employees had to Regal (*e.g.*, Br. 63, 67). Under its first aspect, the theory suffers from all the defects of the similar argument about Grohne and the Regal Division of Lear Siegler—only more so. For here it is uncontroverted that Regal as Copperweld's subsidiary made no effort to restrict access to the sort of information allegedly taken—*i.e.*, shop drawings and blueprints of machinery. (Reply Br. 23; DX 300 et seq.).[31]

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[30] Contrary to defendants' argument (Reply Br. 21-23 + n.18) the presence of "confidential stamps" on Regal documents does not establish confidentiality. *United States Trotting Ass'n* v. *Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981) (*en banc*), on which defendants rely, only says that a proprietary legend, supported by other facts indicative of ownership, can, if unrebutted, lead to summary judgment on a misappropriation claim. This is not a misappropriation case, and ownership and confidentiality are not identical concepts.

[31] Well after the hirings, Copperweld's legal expert wrote:

> [L]ittle or no security has been maintained even with regard to those specific matters that could legitimately be considered as confidential to the company. Thus, there is relatively open

(footnote continued on next page)

Under its second aspect, the theory does not state a claim unless the following elements are made out:

> (1) existence of a valid business relationship or expectancy;
>
> (2) knowledge of the relationship or expectancy on part of the interferer;
>
> (3) an intentional and malicious interference inducing or causing a breach or termination of the relationship or expectancy;
>
> (4) resultant damage to the party whose relationship or expectancy has been disrupted.

Ancraft Products Co. v. *Universal Oil Products Co.*, 84 Ill. App. 3d 836, 844, 405 N.E.2d 1162, 1168 (1st Dist. 1980). In the absence of an employment contract (as here) malice becomes a key element. Without malice, "principles of free competition prevent liability to a subsequent employer." *Id.* at 844. Yet malice is exactly what defendants here could not show, except by asserting that it was inferrable from the acquisition of Regal's technical drawings. As was the case with the unfair competition claim, defendants' arguments on this point are circular. They would not have been rendered more convincing if Judge Will had admitted the proffered testimony of two additional witnesses—one an employee who assumed she was being solicited but could not point to any-

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(footnote continued from preceding page)

> access to the plant and to files; there are no sign-in or sign-out procedures; none of the plant areas are marked as "restricted" and few documents are marked as "confidential," there are no inhibitions on copying or removing documents, etc. Moreover, the company has issued no instructions to nor obtained any agreements from its employees that they will not disclose information when their employment terminates, nor does it have any agreements with key employees restricting their future competition.
>
> App. 768.

thing specific in her conversation with Grohne, the other a man who worked for Regal as an independent sales agent. Copperweld and Regal are basically arguing "[t]hat nobody in his business may offer better terms to an employe, himself free to leave." That, in the words of Learned Hand, "is so extraordinary a doctrine that we do not feel called upon to consider it at large." *Triangle Film Corp.* v. *Artcraft Pictures Corp.*, 250 F. 981, 983 (2d Cir. 1918), quoted in *TAD, Inc.* v. *Siebert*, 63 Ill. App. 3d 1001, 1007, 380 N.E.2d 963, 967 (1st Dist. 1978). See also Perlman, *Interference with Contract and Other Economic Expectancies*, 49 U. Chi. L. Rev. 61, 111-115 (1982). Judge Will did not err in taking defendants' counterclaim issues away from the jury.

V. THE DAMAGE AWARDS

In the damages phase of this bifurcated proceeding, the jury returned the following damage verdicts:

> [T]he damages sustained by Independence as a result of the conspiracy between Copperweld and Regal against Independence in violation of the antitrust laws and for inducement of the breach by Yoder of its contract with Independence, but exclusive of any damages relating to the activities in 1975 of Regal with respect to Deere Plow and Planter Works, were $2,499,009.
>
> [The damages for the antitrust violation and the inducement of the breach of the Yoder-Independence contract are the same and should not be added together.][32]
>
> [T]he damages sustained by Independence as a result of the improper interference in 1975 by Regal with Independence's business relationship with Deere Plow and Planter Works and the commercial defamation of Independence by Regal to Deere were $15,000.

[32] The bracketed language in this verdict form and the one that follows went to the jury.

> [The damages for the improper interference and the commercial defamation are the same and should not be added together.]

App. 223. The defendants challenge both the amount of the damages and the propriety of the instruction that equated tortious inducement and antitrust damages.

A. The Instruction

In the damages part of this litigation, state law and federal antitrust law again converged (cf. Part IV.A *supra*). As was the case with the two theories of liability, so here with the two types of damages the jury was instructed in a way that, had there been error, might have affected the whole verdict.[33] Accordingly, although we have affirmed the antitrust liability and will (in Part V.B *infra*) affirm the antitrust damages, we must first address defendants' state-law arguments.

The defendants' theory is that when Judge Will told the jurors that damages on Count I (the antitrust claim) and Count IV (the tortious inducement of breach of contract claim) were "the same and should not be added together," and then told them that they could "consider estimates and reasonable approximations to the extent necessary to determine Independence's damages," he effectively obscured the differences between federal antitrust damages and Illinois' more rigorous proof requirements. The defendants represent that Illinois requires tortious inducement damages to be shown "with a reasonable degree of certainty." *William Zeigler & Son* v. *Chicago Northwestern Development Co.*, 71 Ill. App. 3d 276, 288, 389 N.E.2d 195, 203 (2d Dist. 1979) (quoting *Rivenbark* v. *Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 538-539,

[33] Defendants have preserved the issue by appealing both the instruction and the amount of antitrust damages. On the liability point, they could have been treated as having waived it by failing to raise the same arguments in the antitrust context as they did in their appeal of liability for tortious interference with the Yoder contract. We have not held them to a waiver.

346 N.E.2d 494, 496 (5th Dist. 1976)). Then they suggest that Illinois courts will not entertain claims for lost business profits unless the business has a record of performance established before, rather than after, the tortious interuption. Taken to its logical (but absurd) conclusion, this argument suggests that whenever tortious interference keeps a business from getting started, even if the business subsequently prospers the harm is uncompensable. If that were an accurate statement of Illinois law, it would indeed make antitrust and tort damages subject to different standards. A business excluded from the market by other businesses' antitrust violations can ordinarily recover lost profits for the period of exclusion. *Midland Telecasting Co.* v. *Midessa Television Co.*, 617 F.2d 1141, 1144 n.6 (5th Cir. 1980), certiorari denied, 449 U.S. 954; *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), certiorari denied, 390 U.S. 904.

The truth of the matter is that defendants' statement of Illinois law is in error. Illinois courts do not require the impossible in a case where damages are sought for lost profits. See, *e.g.*, *Hemken* v. *First National Bank of Litchfield*, 76 Ill. App. 3d 23, 27, 394 N.E.2d 868, 872 (4th Dist. 1979) (emphasis added):

> Where lost profits are sought to be recovered as damages, the recovery is to be based upon the net profit. Net profits are determined by computing the difference between the gross profits and the expenses that would be incurred in acquiring such profits. While these damages may not be speculative, *they need not be proved to a mathematical certainty. The plaintiff is only required to show a reasonable basis for their computation.*

The case the *Hemken* court cited as authority was *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, a federal antitrust case which allowed great latitude to the plaintiff in proving the amount of damages.

Defendants' theory that a prior profit history is essential has also been rejected by the Illinois Supreme Court in *Schatz* v. *Abbott Laboratories, Inc.*, 51 Ill.2d 143, 147-148, 281 N.E.2d 323, 325-326 (1972):

> We do not interpret [a 1917 Illinois Supreme Court case] to hold that evidence of prior profits is the *sine qua non* of proof of damages suffered by a business enterprise. The significant holding found in the opinion is stated at [277 Ill. 286, 289], as follows: "It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. * * * All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

The Illinois cases on which defendants rely are either distinguishable from or earlier than Schatz.[34] There are also cases later than the Maryland and New York ones defendants cite, in which their purported rule has been rejected.[35]

Likewise, in applying Illinois tort law in federal cases, our own Court has stated that "only a reasonable basis of computation is required for the submission of the question of

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[34] As Judge Will noted, *Rhodes* v. *Sigler*, 44 Ill.App. 3d 375, 357 N.E.2d 846 (3d Dist. 1976), contains only weak dictum; and *Tonchen* v. *All-Steel Equipment, Inc.*, 13 Ill. App. 3d 454, 300 N.E.2d 616 (2d Dist. 1973), reversed damages for lack of evidence, not for unrecoverability as a matter of law (App. 284). Defendants' other cases are Illinois Appellate Court decisions from 1932 and 1908.

[35] See *e.g. John D. Copanos & Sons, Inc.* v. *McDade Rigging and Steel Erection Co.*, 43 Md. App. 204, 403 A.2d 402 (1979); *Perma Research & Development Co.* v. *Singer Co.*, 402 F. Supp. 881 (S.D.N.Y. 1975), affirmed, 542 F.2d 111 (2d Cir. 1976), certiorari denied, 429 U.S. 987 (applying New York law).

damages to the jury" (*Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 293 (7th Cir. 1969), certiorari denied, 396 U.S. 902), and that "determinations [of tort damages] did not have to be based on mathematical certainties" (*Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982, 991 (7th Cir. 1976)).

Thus Judge Will's instruction, allowing the jury to consider reasonable approximations and estimates, is consistent with Illinois tort law. Furthermore, defendants' selective quotations from the instructions fail to reveal that Judge Will also told the jury—in the same breath—that there must be a "sufficient basis in the evidence from which your estimates may be inferred" and that it could not award damages "based on pure speculation, guess work, or conjecture." Damages had to be "reasonably established by the plaintiffs by a preponderance of the evidence." (Indep. Br. 87).

Viewing the instructions as a whole, we conclude that the district court did not err in equating federal antitrust damages with damages for tortious inducement under Illinois law.

B. The Sufficiency of the Damage Evidence

Defendants urge that the jury awards of $2,499,009 on the antitrust and tortious inducement of Yoder's breach of contract counts are not supported by the evidence. They make a similar—but more cursory—argument about the $15,000 awarded on Counts IV and V (Regal's interference with the Independence-Deere relationship and Regal's commercial defamation.)[34] We find the proof adequate to support both awards.

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[34] Defendants assert in n.28 of their principal brief and n.21 of their reply brief that the evidence did not support an award of $15,000 against Regal. However, the evidence showed that Regal salesman Harry Bishop told Doris Lang, an assistant Deere buyer for structural steel tubing, that Independence was not a reliable source of tubing because it was in financial trouble, unable to borrow money or pay its creditors. These statements, though untrue, were repeated on three or four occasions. As a result of

(footnote continued on next page)

We note at the outset that there is a limit to the exactness the defendants can demand. Not only are reasonable projections and estimates generally acceptable, as indicated above, but a defendant whose actions contribute to the difficulties of accurate measurement is in a poor position to demand precision. Instead the factfinder may act on probability and inference. See *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980) and *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970), certiorari denied, 400 U.S. 1020, both cases in which we followed the Supreme Court's lead.[37] As already mentioned, Judge Will was more cautious in instructing the jury, however (Indep. Br. 87).

Defendants' attack on the expertise of Independence's chief damages witness is misguided. At the time he testified Albert Madansky was a professor at the University of Chicago Business School, specializing in econometrics, statistics and marketing. His *curriculum vitae* fills four pages of the record (App. 704-707) and documents his extensive academic and business experience and his familiarity with the use of statistical methods to analyze business problems. Indeed he has appeared as an expert witness in other Sherman Act cases. Defendants' only definite objection to Dr. Madansky is that he is not an economist, but his methodology and its critical assumptions were supported by just the sort of expert defendants desiderate: Dennis Carlton, a professor on the economics faculty at the University of Chicago.

Dr. Madansky used a "pull-back" analysis. First he examined actual demand, price, and cost of manufacture in the

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(footnote continued from preceding page)

them, Ms. Lang did not recommend a hitherto planned increase in Deere's purchases from Independence. The jury awarded Independence $15,000 of the $30,000 it had sought on the Deere claims.

[37] See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100; *Bigelow* v. *R.K.O. Radio Pictures, Inc.*, 327 U.S. 251; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555; *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U.S. 359.

steel tubing market in the damages period. Then he worked out Independence's actual growth and market share in the first two years of its operation and compared it to the industry situation in the damage period to establish what Independence's performance would have been had its entry into the market not been delayed. This methodology has been endorsed by the Supreme Court (note 37 *supra*) and by us in *Trabert & Hoeffer, Inc.*, and *Locklin, supra*. The Fifth Circuit in *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580-581 (1980) concurs. Even defendants acknowledge the general acceptance of the theory (Br. 69).

The defendants' main argument is that there were drastically different market conditions in the steel tubing market in the base period and the projection period. The only such difference they identify, however, is a shortage of steel in 1974. That was addressed in the evidence: Regal's purchasing agent testified that it was able to obtain 70% of its steel needs in 1974; the vice president of Welded Tube Company said his company got 80% of its requirements; and Bureau of Census information and defendants' own expert estimated that the industry as a whole operated at 85-89% of capacity (Indep. Br. 82). Furthermore, allocations during the shortage were based on prior purchases. Independence showed that it had had an offer for 2,000-3,000 tons per month from the fall of 1973 through the end of 1974—which the loss of the Yoder mill forced it to forego (*id.*). It also showed that U.S. Steel, which handled Independence's account once it began production, had an abundance of steel in 1973 (*id.* at 83). There is nothing in this evidence that is inconsistent with Dr. Madansky's assumption that Independence could have obtained 50,000 tons of steel in 1974 (Def. Br. 71).

Defendants also argue that Independence's calculations improperly assumed Independence could charge "premium prices" during 1974. On the contrary the price data used were Independence's actual prices for the last two quarters of 1974 and figures based on government and private sources for earlier quarters, with appropriate seasonal adjustments in

both cases. Both the extrapolated and the actual prices were significantly below prevailing industry prices. (Indep. Br. 83).

The defendants object to the assumption that Independence could have produced 264 tons of steel tubing in December 1973 and that it could have operated at 70% of capacity within five months of starting production. There was evidence to support both propositions. Yoder's delivery of the mill could not be later than December 1973 without exposing Yoder to a $250,000 penalty. In fact just before Yoder's final cancellation, the mill was two to three months ahead of schedule. (Indep. Br. 80). The tonnage figure was based on Independence's actual experience in the first month (September 1974) it installed and used the Abbey Etna mill. The five-month figure was a conservative estimate: Independence's actual start-up time with the Abbey Etna mill was only three months. Both assumptions are therefore supported by Independence's records and Grohne's testimony.[38] The 70% figure is also borne out by Independence's performance and by the evidence about the capacity of industry in general and Independence's competitors in particular (pp. 36-37 supra).

Defendants' final sally is that the overall evidence in this case was as inadequate as the evidence in *Pacific Mailing Equipment Corp.* v. *Pitney Bowes, Inc.*, 499 F. Supp. 108 (N.D. Cal. 1980). The situations are not at all parallel. There the

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[38] Defendants want to discount Grohne's testimony and any of Dr. Madansky's assumptions that were based on it. In the first place, there was ample corroborative evidence from government and industry records, the testimony of suppliers, customers, and competitors, and even from defendants' experts. In the second, it was the jury's province to decide what weight and credibility to attach to Grohne's testimony in view of his interest. *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580 n.11 (5th Cir. 1980); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 507 n.41 (9th Cir. 1977), certiorari denied, 434 U.S. 1040.

plaintiff sought to present lost profits evidence based on "pro forma profit and loss statements, entirely unannotated and totally failing to reflect their source or the underlying computations" (499 F. Supp. at 118), and on wholly hypothetical assumptions that (1) in an unrestrained market 50% of the mailing machines sold would be used machines, (2) plaintiff would have a 25% share of the used-machine market, (3) Pitney Bowes would not try to sell used machines, (4) Pitney Bowes' overall market share would decline from 90% to 50%, and (5) all this change would be accomplished without affecting price. *Id.* at 119, 120 n.3. Independence's damage case, including the testimony of Grohne, was wholly different. It involved exactly the "supporting studies, analyses, comparisons, [and] other factual, objective, observed or verifiable data" that the *Pacific Mailing* court lacked but would have found sufficient, *id.* at 119.

There is one last, but important, point overlooked by defendants. Independence's damage evidence was offered in support of lost profits totalling $8,298,245. The jury awarded less than a third of that amount ($2,499,099). That suggests that the defendants have already had the benefit of whichever of their contentions the jury found convincing. The defendants have not differentiated between the sufficiency of the evidence to support the damages as sought and its sufficiency to support the damages as found. We think the conservatism of the jury's verdict and the quantity and quality of the proof would make any such attempted distinction fruitless.

The judgments appealed from are affirmed in their entirety. Costs to appellees.

APPENDIX

Judge Will's charge (App. 156-158):

So, in order to find that a combination or conspiracy to violate the antitrust laws existed between Copperweld and Regal, you must find that the two companies, in fact, operated as separate entities. In making this decision, you should consider the following matters:

1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated;

2. Whether the two companies are run by separate management staffs;

3. Whether the two companies maintained separate corporate offices;

4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary;

5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions;

6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;

7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;

8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence;

9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

You must consider all of the facts, and that includes the nine that I have given you here, and any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other.

Photovest's analysis, 606 F.2d at 726-727:

The evidence in the present case shows that Labs was separately incorporated to minimize potential for labor relations friction which might arise from the disparity in benefits between employees of photo processing labs and existing Fotomat personnel. The executive management of Fotomat overlapped that of Labs. Moreover, Labs did not maintain separate corporate offices. Profit-related compensation for Labs personnel was calculated solely in terms of the profitability of Fotomat rather than in terms of an appraisal of Labs' independent net income. For all external purposes, financial statements and tax return data were consolidated. In publicly circulated financial statements, all subsidiaries of Fotomat were lumped together with the parent and referred to simply as "the Company." Historically, Labs was formed to integrate photo processing services into Fotomat owned processing facilities and never existed for the independent purpose of establishing a processing business to service non-Fotomat customers. It acted merely as the processing arm of the enterprise.

In response to this substantial evidence that Fotomat and Labs were not separate entities for antitrust purposes, Photovest offers only two statements, one by Fotomat's in-house counsel in which he said that Labs has independent personnel, laboratories, machinery, equip-

ment, and costs and that it bills Fotomat just as independent processors do, and another by Fotomat's president in which he said that Labs "was a separate business and we elected to treat it as such." The fact that Labs billed Fotomat for processing and had separate costs, machinery, equipment, etc., is not very significant other than as evidence that separate accounting made for internal accounting clarity. And the isolated statement by Fotomat's president cannot be given great weight.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

APPENDIX B

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION**, a Pennsylvania corporation; **REGAL TUBE COMPANY**, a Pennsylvania corporation; **THE YODER COMPANY**, an Ohio corporation, *Defendants.*	No. 76 C 4201

MEMORANDUM OPINION

Copperweld and Regal have moved for entry of judgment n.o.v. or, in the alternative, for a new trial with respect to all of Independence's claims and their counterclaim. In their motion, they cite seven alleged substantive errors, 23 alleged errors in the Court's instructions to the jury, over 150 alleged evidentiary errors, and approximately 300 allegedly prejudicial remarks or rulings by the Court. In this opinion, however, we will address only those alleged errors that Copperweld and Regal believed were important enough to brief. Because the defendants' arguments are not meritorious, we deny their motions.

COUNT I: THE ANTITRUST CLAIM

Copperweld and Regal argue that they are entitled to judgment n.o.v. for the following reasons:

1) there is insufficient evidence that Copperweld and Regal had the capacity to conspire,

2) there is insufficient evidence that Copperweld and Regal actually conspired,

3) even if there is sufficient evidence of a conspiracy between Copperweld and Regal, there is no evidence that Regal was part of the conspiracy in February 1973, when Copperweld allegedly induced Yoder to breach its contract with Independence.

4) there is insufficient evidence of an unreasonable restraint of trade,

5) there is insufficient evidence of "antitrust injury" and

6) Copperweld and Regal's allegedly conspiratorial acts were constitutionally privileged.

Copperweld and Regal also argue that they are entitled to a new trial on the following grounds:

1) the improper jury instructions with regard to the criteria for determining whether related corporations can conspire,

2) the failure to instruct the jury that conduct consistent with legitimate business goals cannot support an inference of unlawful conspiracy,

3) the refusal to instruct the jury concerning geographic markets and submarkets,

4) the failure to instruct the jury that it could not find an unreasonable restraint of trade in the absence of evidence that the defendants' conduct affected price in the market,

5) the failure to instruct the jury that "antitrust injury" is not the equivalent of all injury proximately caused by the defendants' anticompetitive behavior,

6) the admission of Mr. Smith's testimony in the earlier *Imetal* litigation and Mr. Foster's affidavit during plaintiff's rebuttal evidence,

7) the admission of evidence relating to Copperweld's contact with various third parties prior to or after the alleged conspiracy between Copperweld and Regal,

8) the admission of Mr. Grohne's testimony as to his conversation with Abbey-Etna in December 1973,

9) the refusal to admit Mr. Jentes' testimony concerning the legal advice he gave Copperweld,

10) the admission of Mr. Grohne's and Mr. Bogolub's testimony regarding Independence's ability to secure steel, and

11) the refusal to admit data regarding Regal's share of the market.

Sufficiency of the Evidence

Most of the arguments advanced by Copperweld and Regal in support of their motion for judgment n.o.v.—that there is insufficient evidence to support the jury's verdict in several respects—are identical to the arguments they raised in support of their earlier motion for a directed verdict. In their briefs, Copperweld and Regal describe at length the evidence presented at trial in an effort to demonstrate its insufficiency. From their own recitation of the evidence, however, it is clear, as we found in denying their earlier motion, that there was sufficient evidence from which the jury could reasonably infer that Copperweld and Regal had the capacity to conspire, that they in fact conspired, that the conspiracy began prior to February 1973, that their actions resulted in an unreasonable restraint of trade, and that there was an injury to competition of the sort the antitrust laws were intended to prevent. Admittedly, the evidence in support of some of these elements is not overwhelming; however, it need not be. Moreover, Copperweld and Regal's description of the evidence is limited and highly selective. For the most part, they cite only the testimony of their own witnesses and refer only to their own exhibits. Accordingly, we find unconvincing Copperweld and Regal's argument that they are entitled

to judgment n.o.v. on the antitrust claim on the ground that there is insufficient evidence to support the jury's verdict.

Copperweld and Regal's argument that there is insufficient evidence to support the jury's finding that Regal was part of the conspiracy in February 1973 when Copperweld sent its warning letter to Yoder warrants additional discussion. The crux of their argument is that, since it is uncontested that Regal knew nothing about Copperweld's letter until several years later, Regal could not have been part of the "conspiracy" in February 1973, when the only damage to Independence occurred. If Regal was not part of the "conspiracy" at that time, there was no conspiracy in violation of the antitrust laws because no damage resulted from the conspiracy after February 1973. Copperweld and Regal overlook the principle that a conspirator is liable for all actions of its coconspirators taken in furtherance of the conspiracy, even those actions of which it is unaware. *See T.V. Signal Co. of Aberdeen* v. *American Telephone & Telegraph*, 1972 Trade Cases ¶ 74,061 (8th Cir. 1972). Thus, if Regal was part of a conspiracy to drive Independence out of the market at the time Copperweld sent its letter to Yoder, it is irrelevant that Regal was unaware of the letter itself. Having reviewed the evidence, it is clear that there is evidence from which the jury could reasonably infer that Regal was part of the conspiracy as early as February 1973.

Copperweld and Regal also argue that, by the Court's own logic, Regal could not be found to have been part of the conspiracy in February 1973. Specifically, they point to our statement that "[t]here's no evidence that Regal did anything which constituted tortious conduct towards Independence in connection with the Yoder contract." They also claim that the legal standard for determining whether there was a tortious interference with contract is identical to the standard for determining whether there was an antitrust violation in this case. Thus, they argue, if Regal was not a joint tortfeasor with Copperweld concerning the letter sent to Yoder, it is legally impossible for Regal and Copperweld to

be liable in damages as antitrust conspirators with respect to this letter. The problem with this argument is that the legal standard for determining liability for tortious interference with contract is *not* the same as the standard for determining whether there has been a conspiratorial violation of the antitrust laws. Whereas a defendant must have knowledge of the existence of the contract and of the specific act causing the breach to be liable for tortious interference with contract, *see Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 291 (7th Cir. 1969), *cert. denied*, 396 U.S. 902 (1969), a defendant need not have such specific knowledge to be liable for the breach of contract induced by his co-conspirators in violation of the antitrust laws, *see T.V Signal Co. of Aberdeen* v. *AT&T, supra* at ¶ 74,061. As mentioned earlier, a conspirator is liable for all actions of his co-conspirators taken in furtherance of the conspiracy, including those of which he has no knowledge. Thus, Copperweld and Regal's argument that there is insufficient evidence to support the jury's finding that Regal was part of the conspiracy at the time the only damage to Independence occurred is meritless.

Noerr-Pennington Defense

It is also clear that Copperweld and Regal's actions in furtherance of their conspiracy were not constitutionally privileged as they claim. The defendants argue that the only evidence supporting Independence's claim of an antitrust violation are the letters Copperweld's Mr. Smith wrote to a number of third parties suspected of doing business with Independence, and Copperweld and Regal's surveillance of Independence. According to the defendants, the uncontradicted evidence indicates that their sole purpose for engaging in these activities was to prepare for litigation and to notify third parties that Copperweld and Regal were contemplating seeking injunctive relief against Independence or Mr. Grohne. The notification was necessary, say the defendants, to obviate the risk that these third parties would defeat any future injunctive action by claiming that they were detrimentally affected by Copperweld and Regal's delay in bring-

ing suit. Thus, the defendants conclude, since these activities were directly related to their preparation of a possible lawsuit, and since such activities are protected under the First Amendment, they cannot be employed as a basis for finding an antitrust violation.

The Noerr-Pennington doctrine, named after *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961), and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), as originally formulated, "shield[ed] from the Sherman Act as a constitutionally protected right of petition a concerted effort to influence public officials, regardless of intent or purpose." *City of Mishawaka* v. *American Electric Co.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, U.S. (1981). Thus, where two or more persons or corporations banded together to assert their rights through court proceedings, their concerted activity was protected by the First Amendment. *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

In recent years, however, the Noerr-Pennington doctrine has been narrowed to the extent that only concerted efforts to influence public officials that are undertaken for a lawful purpose are protected. In *California Motor Transport Co.* v. *Trucking Unlimited*, *supra*, the Court held that if, as the complaint alleged, the defendants' purpose in instituting state and federal agency and court proceedings was to defeat competitors' applications for operating rights, the Noerr-Pennington doctrine did not immunize them from antitrust liability. *Id.* at 515. If the end result of the defendants' actions was unlawful, said the Court, it is irrelevant that the means used to achieve that end were lawful. *Id.* at 515. Additionally, in *Citicorp* v. *Interbank Card Association*, 478 F.Supp. 756 (S.D.N.Y. 1979), the court held that where protected conduct is coupled with proscribed conduct the protected conduct does not legitimate the illegal activity. *Id.* at 762. *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, *supra* at 514-15; *City of Mishawaka* v. *American Electric Co.*, *supra* at 982.

As far as the present case is concerned, the Noerr-Pennington doctrine does not preclude a finding of antitrust liability based on Copperweld and Regal's letter writing and surveillance campaign. There is sufficient evidence from which the jury could conclude that this campaign was not simply a prelude to the defendants' seeking injunctive relief against Mr. Grohne or Independence but "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, supra* at 144, and, therefore, not protected activity under the Noerr-Pennington doctrine. There is evidence of telephone calls between Mr. Smith and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts, between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's products. These activities have no relationship to Copperweld and Regal's alleged desire to preserve their standing to seek injunctive relief and, therefore, suggest that the defendants' true motivation in writing to Yoder was to keep Independence out of the structural tubing market or to hamper its ability to compete there. Thus, even if Copperweld and Regal's letter writing and surveillance are protected activities which might have been privileged, this does not legitimate an otherwise illegal scheme. *See City of Mishawaka* v. *American Electric Co., supra* at 982-83.

Capacity to Conspire

Turning to the arguments advanced by Copperweld and Regal in support of their motion for a new trial, the defendants first argue that we improperly instructed the jury with regard to the criteria for determining whether related corporations can conspire. The jury was instructed that, in

order to find that Copperweld and Regal conspired in violation of the antitrust laws, they first had to find that the two corporations "operated as separate entities." In this connection, the jury was instructed to consider:

> 1. The history of the two companies, that is whether they functioned as separate companies before they became affiliated;
>
> 2. Whether the two companies are run by separate management staffs;
>
> 3. Whether the two companies maintained separate corporate offices;
>
> 4. Whether the parent...pays the salaries, expenses, or losses of the subsidiary;
>
> 5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of its business. In this connection, you should consider both the day-to-day operating decisions and the major or executive policy decisions;
>
> 6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries;
>
> 7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans;
>
> 8. Whether both companies were separate participants in the alleged unlawful activity complained of...;
>
> 9. Whether both companies have common officers or directors, [although] the existence of some common officers or directors does not alone render the two companies incapable of conspiracy.

* * * * *

> [10.] [A]ny other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies....

Tr. 8472-74. Copperweld and Regal argue that this instruction ignores the dictates of *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 455 U.S. 917 (1980), in that it erroneously fails to mention three of the relevant factors listed by the court in *Photovest* and includes factors that the *Photovest* court apparently did not consider relevant. Specifically, the defendants claim that the instruction fails to tell the jury to consider "the extent of the integration of ownership,...the extent to which significant efficiencies would be sacrificed if they were required to act as two firms,...[and] the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms." *See id.* at 726. The defendants also claim that factors 3 through 8 in our instructions are irrelevant.

Contrary to the defendants' assertion, however, the court in *Photovest* did not suggest that the factors it listed were the only factors relevant to a determination of whether related corporations could conspire, or that the factors listed would be relevant in evey case. Indeed, the court specifically stated that those mentioned were only "some" of the relevant factors, and that the fact finder "must decide each case on its particular facts." Thus, the jury's failure in this case to consider some of the factors listed in *Photovest* and its consideration of additional factors is not forbidden by *Photovest*.

Additionally, some of the factors which we instructed the jury to consider are ones which the court in *Photovest* in fact considered, even though it did not include them in the particular list on which Copperweld and Regal now rely. After mentioning several relevant factors, the court in *Photovest* embarked on a discussion of whether the two related corporations in that case could conspire. In the course of its discussion, the court expressly noted that the two corporations did not maintain separate corporate offices, that employment compensation was calculated and paid differently in

each corporation, that the business, tax and financial records of the two companies were consolidated, and that the two corporations did not generate substantial business from outsiders. *See id.* at 726-27. Thus, contrary to the defendants' contention, factors 3, 4, 6 and 7 in our instructions are entirely consistent with *Photovest*. Finally, the remaining factor listed in our instructions—whether the two corporations make their own operating and policy decisions—is one which courts in other circuits have found helpful to a determination of whether related corporations can conspire.[1] *See, e.g., Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 453 (9th Cir. 1979). We simply tailored the jury instructions regarding the criteria for determining whether related corporations can conspire to the facts in this case, rather than duplicating exactly the suggested criteria in *Photovest*. This is entirely consistent with *Photovest* and not error.

Conduct Consistent with Legitimate Business Goals

Copperweld and Regal argue, second, that they are entitled to a new trial because we failed to instruct the jury that conduct consistent with legitimate business goals cannot support an inference of unlawful conspiracy. Contrary to Copperweld and Regal's assertion, however, conduct consistent with one's economic self-interest *can* support an inference of unlawful conspiracy. *See, e.g., First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 277 (1968) ("[A] jury question might well be presented as to Cities' motives in not dealing with Waldron, . . . notwithstanding that such a failure to deal conceivably might also have resulted from a whole variety of non-conspiratorial motives involving the exercise of business judgment . . . ."); *Feminist Women's*

[1] The court's failure in *Photovest* to mention these remaining factors may be due to the record in that case which, the court specifically noted, was seriously incomplete. It is possible that the court had no information regarding how the two firms; major policy decisions and day-to-day operating decisions were made. If so, its failure to list these factors as important is not a significant omission.

Health Center, Inc. v. *Mohammad*, 586 F.2d 530, 546 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

Furthermore, the only authority Copperweld and Regal have mustered for their position, when viewed in context, is hardly unequivocal support. In *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978), the court stated that "[o]nly where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, . . . may an [unlawful] agreement be inferred from such parallel action." *Id.* at 884. In that case, however, the plaintiff charged a film distributor with participation in a bid-rigging conspiracy. The conspiracy was initiated by various theater owners in the hope that they could lease films at a lower price than they had under a freely competitive bidding system. The only evidence of the distributor's participation in the conspiracy was its acceptance of the theater owners' rigged bids. Thus, in *Admiral Theatre Corp.* it was not simply that the film distributor's actions were consistent with its self-interest but also the fact that the distributor's actions were not unusual in any respect and that there was no other evidence of participation in the conspiracy which led the court to affirm the district court's directed verdict in the distributor's favor. *See also H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Aviation Specialties, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978). *Admiral Theatre Corp.* is not, therefore, support for the defendants' theory that conduct consistent with the actor's legitimate business goals can never support an inference of unlawful conspiracy. Consequently, failure to give an instruction consistent with their theory was not error.[2]

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[2] Copperweld and Regal also contend that the Court erred in refusing to instruct the jury that "apparently legitimate business reasons for implementation of a policy or course of conduct are to be taken into account" in determining whether a defendant participated in an unlawful conspiracy. The defendants' complaint is

(footnote continued on next page)

Jury Instructions Regarding Relevant Markets

Copperweld and Regal argue that the Court erred in refusing to instruct the jury as they requested concerning geographic markets and submarkets. They do not state in what way the Court's charge regarding geographic markets is incorrect or what a proper instruction would have included. Moreover, the instruction regarding geographic markets actually given was based on the defendants' requested instruction, although it is shorter, simpler and less repetitive than that requested. *See* Tr. 8478.

Equally unmeritorious is the defendants' claim that the Court's instruction regarding submarkets was incorrect. They claim that our instruction erroneously allowed the jury to find that a tubing submarket existed even though buyers sometimes used tubing and other structural shapes for the same purpose. The jury was instructed that product submarkets exist in some cases and that " the uniqueness of the product and its uses," Tr. 8479, is the most significant indication of a product submarket. The instruction further noted that "[i]f buyers interchange products for the same uses, [the products] are considered to be in the same market." Tr. 8479. Our instruction differs from the defendants' tendered instruction only in that we refused to tell the jury that a complete lack of interchangeability was a prerequisite to a finding of a product submarket. In fact, however, complete lack of interchangeability is not necessary. *United States* v.

(footnote continued from preceding page)

baseless, however, since we gave such an instruction, albeit in slightly different language:

> A person can adopt a policy or take an action based upon his own individual free choice and prompted by the desireability of the policy or action from his own business point of view. To do this is to exercise a businessman's right to decide for himself the terms on which he will do business and does not necessarily constitute the formation of or a participation in a combination or conspiracy.

Tr. 8466.

Grinnell Corp., 384 U.S. 563, 574 (1966); *United States* v. *Aluminum Company of America*, 377 U.S. 271, 275 (1964); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 30 (3rd Cir. 1978). Thus, the jury instructions regarding geographic markets and product submarkets were correct.

Unreasonable Restraint of Trade—Requirement of Affect on Price

Copperweld and Regal assert that the Court erred in failing to instruct the jury that it could not find an unreasonable restraint of trade in the absence of evidence that the defendants' conduct affected price in the market. Interestingly, but not surprisingly, the defendants have cited no cases supporting this novel theory. It is well established that an unreasonable restraint of trade occurs whenever "[a] restraint . . . tends or is reasonably calculated to prejudice the public interest." *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798, 810 (7th Cir. 1980), *cert. denied*, U.S. (1981). The public interest is prejudiced when prices are fixed or regulated, production is limited or parcelled out unfairly, or the quality of goods deteriorates. *See Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). Thus, it is not necessary, as the defendants contend, for the plaintiff to prove that the defendants' conduct affected prices in the marketplace.

"Antitrust Injury"

The defendants' fifth contention is that the Court failed to instruct the jury that "antitrust injury" is not simply the equivalent of all injury proximately caused by the defendants' conduct. Their argument in this respect is rather confused and seems actually to be an amalgam of several different contentions, each of which deserves individual discussion.

First, Copperweld and Regal argue that there was insufficient evidence to support a finding that Independence's exclusion from the market injured competition. Although, as

mentioned earlier, the evidence of injury to competition was less than overwhelming in this case, there was sufficient evidence presented at trial from which the jury could reasonably conclude that competition was impaired for a period of time as a result of the defendants' conduct.

Copperweld and Regal also argue, in a very vague fashion, that the damages Independence sustained bear no relationship to the injury to competition. According to the defendants, an antitrust plaintiff can only recover those damages which are a "particularized manifestation" of the injury to competition. The cases they cite do not support this proposition, however. Rather, these cases simply hold that an antitrust plaintiff cannot recover anything unless there is proof of injury to competition—something which was missing in the particular cases. *See Almeda Mall, Inc.* v. *Houston Lighting & Power Co.*, 615 F.2d 343, 353-54 (5th Cir. 1980), *cert. denied*, U.S. (1981); *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1136 (5th Cir. 1979), *rev'd*, U.S. (1981); *North American Soccer League* v. *National Football League*, 505 F.Supp. 659, 677-78 (S.D.N.Y. 1980) (no injury to competition because there was no competition). The jury in the present case was instructed that it had to find an injury to competition in order to find the defendants guilty of violating the antitrust laws. See Tr. 8480.

Finally, the defendants raise for a second time their argument that there is no evidence suggesting Regal knew about Copperweld's letter to Yoder in February 1973. Regal, they urge, was therefore not part of an unlawful conspiracy at that time, and Independence cannot collect damages stemming from Yoder's breach of contract in the absence of a conspiracy. But, again, the defendants have ignored the principle that Regal's ignorance of the letter is not determinative of whether Regal was part of the conspiracy in Febrary 1973, and that, if Regal was part of a conspiracy, it is liable for its co-conspirator's actions regardless of whether or not it knew about them.

Mr. Smith's Imetal Testimony

According to Copperweld and Regal, the Court violated the hearsay rule in admitting Mr. Smith's testimony in the *Imetal* proceedings. This testimony was to the effect that Copperweld and Regal operated substantially independently of one another; it was relevant, therefore, to whether or not Copperweld and Regal had the capacity to conspire. Under F.R.E. Rule 804(b)(1), Mr. Smith's testimony would have been admissible in the present litigation if Mr. Smith was unavailable to testify and if Copperweld "had an opportunity and similar motive [during the first trial] to develop the testimony by direct, cross or redirect examination." Neither of these requirements was met, according to the defendants, so the admission of Mr. Smith's *Imetal* testimony was error.

As for Mr. Smith's availability, Copperweld and Regal argue that since Mr. Smith testified twice at the trial--once during the plaintiff's case and once during the defendants' case—Independence had two opportunities to question him with respect to the substance of his *Imetal* testimony. They concede that he wasn't available to testify during the plaintiff's rebuttal, when the *Imetal* testimony was introduced, but his unavailability at that point, they assert, was due principally to Independence's failure to request his presence in advance of the time it wanted him to testify.

As for Copperweld and Regal's opportunity and motive to develop Mr. Smith's testimony in *Imetal*, Regal argues that, since it was not a party to the prior litigation, it clearly had no opportunity to develop this testimony. In some similar cases, courts have excluded testimony from prior proceedings. *See, e.g., Government of the Canal Zone* v. *Pinto*, 590 F.2d 1344, 1353-54 (5th Cir. 1979); *First National Bank* v. *National Airlines, Inc.*, 22 F.R.D. 46, 48 (S.D.N.Y. 1958). Copperweld, on the other hand, argues that, while it had the opportunity to develop fully Mr. Smith's testimony in *Imetal*, it did not have a motive for doing so. Its argument is based on the general distinctions between the preliminary injunction proceeding in *Imetal* and the present litigation. Although

Copperweld does not say so, the real difference between its motive in *Imetal* and its motive in the present case is that in *Imetal* it was in Copperweld's best interest to establish that Copperweld and Regal operated independently of each other, whereas in the present case it was in Copperweld's best interest to endeavor to establish the opposite. Under Rule 804(b)(1), however, whether a party had a similar motive for developing testimony turns not on whether the party's interests in the contents of the testimony change from one proceeding to the next but on whether the testimony concerns issues important to both proceedings. *Cf. Oberlin* v. *Marlin American Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979).

In the instant case, it is clear that Mr. Smith's testimony in the *Imetal* proceedings related to an issue important in both proceedings. Moreover, a great deal of evidence was presented with respect to Copperweld and Regal's capacity to conspire, of which Mr. Smith's *Imetal* testimony was only a small part.

Copperweld and Regal also contend that Mr. Foster's affidavit, concerning the relationship between Copperweld and its wholly owned subsidiary, should not have been admitted into evidence during the plaintiff's rebuttal. Specifically, the defendants argue that it was improper rebuttal evidence because it is not inconsistent with Mr. Foster's earlier testimony in the case. While this is arguable, if, as the defendants contend, the affidavit is not inconsistent with Mr. Foster's earlier testimony, it was merely cumulative and not prejudicial.

Evidence of Copperweld's Contacts with Third Parties Before and After the Conspiracy

Copperweld and Regal object to the admission of evidence relating to their dealings with third parties, such as the Continental Bank, U.S. Steel, and Abbey-Etna. They argue that, since these contacts with firms took place from late 1973 through early 1976, they are not particularly probative of

Copperweld's and Regal's intent in February 1973, when the defendants allegedly conspired.

First, the evidence of Copperweld and Regal's dealings with third parties is relevant to the issue of their purpose and intent in their dealings with Yoder. That the evidence of these contacts in later years has, in the defendants' opinion, "little probative value" on the issue of their intent in earlier years was a matter for them, as they did, to argue to the jury; it is not a valid reason for refusing to admit the evidence. Moreover, as Independence points out, the conspiracy was alleged to have extended from early 1973 through late 1976. Thus, evidence with respect to the defendants' conduct throughout this period was not only admissable but relevant to the plaintiff's case.

Mr. Grohne's Memorandum of January 15, 1974

The defendants further contend that the admission of Mr. Grohne's memorandum of January 15, 1974, was a "glaring evidentiary error." This memorandum memorializes a conversation between Mr. Mullen of Abbey-Etna and Mr. Grohne in which Mr. Mullen allegedly stated that, on December 13, 1973, Mr. Smith had tried to convince him that it would be illegal for Abbey-Etna to furnish Mr. Grohne with a mill. The defendants argue that this memorandum is hearsay which is not admissible under any exception to the hearsay rule.

The memorandum was admitted into evidence under F.R.E. Rule 803(24), which provides that a hearsay statement not specifically covered by any of the other exceptions to the rule but having "equivalent circumstantial guarantees of trustworthiness" is admissible if the court determines that it is offered as evidence of a material fact, is more probative on the point for which it is offered than any other evidence reasonably available, and if "the interests of justice will best be served by admission of the statement into evidence." We conducted a hearing regarding the memo's admissibility. The arguments the defendants now raise are essentially the

same as those they asserted at the hearing: that because the memorandum was prepared by a party its accuracy is inherently suspect and that, since Mr. Mullen, Mr. Seamans and Mr. Smith testified at trial about their conversation in December 1973, the memorandum was not more probative than other evidence of what was said at the time. We concluded after the hearing that it was admissible under Rule 803(24).

Whether or not the document should have been admitted, however, its admission clearly was not serious error. First, it is not the only evidence that Copperweld's Mr. Smith spoke with Mr. Mullen at Abbey-Etna about the latter's furnishing Independence with a mill. Mr. Mullen, Mr. Smith and Mr. Seamans all testified that such a conversation took place. It is also not the only evidence of what was discussed; Mr. Mullen's, Mr. Smith's and Mr. Seaman's testimony corroborated the memorandum in most respects. The only significant difference between these individuals' reports of their conversation and the report of it in the memorandum is that the memorandum states that the conversation was heated and that Mr. Smith was vehement in his attempt to convince Mullen that selling a mill to Independence would be inadvisable. Thus, since the memorandum adds little to the other testimony regarding the December 13, 1973 conversation, its admission could not have seriously prejudiced the defendants.

Second, the memorandum concerns only collateral issues in this case. Independence did not seek damages based on anything the defendants said or did to Abbey-Etna. Independence introduced the memorandum in order to show that Copperweld threatened Abbey-Etna, as well as others such as the Continental Bank, in order to establish a course of improper conduct on the defendants' part, thereby to prove that the defendants intended to keep Independence out of the market. The evidence with respect to Copperweld's dealings with Abbey-Etna is but a small link in this chain.

Exclusion of Mr. Jentes' Testimony

The defendants next argue that the Court erred in excluding from evidence Mr. Jentes' testimony concerning the advice he allegedly gave Copperweld about a possible suit against Independence or Mr. Grohne. We excluded this testimony after a voir dire hearing on the grounds that it was conclusory, argumentative, cumulative, and most important, irrelevant. The defendants have not stated specifically their objection to our ruling, and we assume it is not a serious one.

Testimony Concerning Independence's Ability to Secure Steel in 1973 and 1974

Copperweld and Regal argue that under F.R.E. Rule 701, Mr. Grohne and Mr. Bogolub should not have been permitted to testify as to their opinions on how much steel Independence could have secured during the steel shortage. Rule 701 provides, in relevant part, that a lay witness may give his opinion on a subject only if his opinion is based on his own perceptions and is helpful to "the determination of a fact in issue." Mr. Grohne's and Mr. Bogolub's testimony, however, was not based on first-hand knowledge or observation according to the defendants.

With respect to Mr. Grohne's testimony, the defendants argue that his opinion could not have been based on first-hand knowledge, since he admitted that he did not know how steel producers made allocation decisions and since he did not purchase any steel during the shortage. With respect to Mr. Bogolub's testimony, the defendants argue that his opinion could not have been based on first-hand knowledge, since it was based on the assumption that he could have obtained a substantial amount of steel from Spain—an assumption that was allegedly disproved by uncontradicted government import statistics. That Mr. Bogolub and Mr. Grohne may not have had first-hand knowledge of *all* facts relevant to an opinion on how much steel Independence could have procured does not disqualify them from expressing their opinions on this subject. *See Bassett Furniture*

Industries of North Carolina, Inc. v. *NVF Co.*, 576 F.2d 1084, 1091 n.4 (5th Cir. 1976), *amended in other respects*, 583 F.2d 778 (5th Cir. 1978). The extent to which Mr. Bogolub and Mr. Grohne may have overlooked or been ignorant of certain facts or made dubious assumptions relevant to their conclusions was a matter for the defendants to argue, as they did, and the jury to consider in judging the two witnesses' credibility. *See id.* at 1091 n.4. Additionally, as far as Mr. Bogolub's testimony is concerned, the defendants' argument that his opinion was based on an undeniably false premise is unconvincing. The fact that no steel of a particular type was imported from Spain during 1973 and 1974, though substantial quantities of other types were, does not necessarily disprove Mr. Bogolub's testimony that he *could* have imported Spanish steel for Independence to use during those years. Thus, the admission of Mr. Bogolub's and Mr. Grohne's opinion testimony was not error.

Market Share Evidence

Copperweld and Regal contend finally that the Court erred in excluding evidence of Copperweld and Regal's market share, since this evidence was not only relevant but determinative of whether or not there was an unreasonable restraint of trade. Specifically, they assert that unless it is established that a defendant has a near-dominant share of the market and uses unfair means to eliminate a competitor, thereby creating the risk of a monopoly, there is no unreasonable restraint of trade. The defendants intended, they urge, to introduce evidence that they did not enjoy a dominant position in the market and, therefore, could not have unreasonably restrained trade.

First, as Independence points out, Copperweld and Regal were allowed to present evidence of their market share. The evidence they claim was improperly excluded would, therefore, have been redundant.

Second, contrary to the defendants' assertion, proof that the defendants enjoyed a near-dominant position in the

market is not a prerequisite to a finding that the defendants' conduct unreasonably restrained trade. The cases on which Copperweld and Regal rely are inapposite.

In *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980), the plaintiff, who had previously been the exclusive supplier of coal for the TVA but was unsuccessful in bidding for a later contract, brought an antitrust action under section 1 of the Sherman Act against the successful bidder, claiming that the defendant, along with its subsidiaries, had engaged in unfair practices "with the purpose of establishing [itself] as a dominant marketer of competitive sources of energy. . . ." The court concluded that proof that the defendants enjoyed substantial market power before the allegedly anticompetitive conduct and that this market power increased afterwards was a necessary part of the plaintiff's case. *Id.* at 558. In the absence of any allegations in this regard, the court concluded that the plaintiff had failed to state a claim. *Id.* at 559. Several of the other cases on which Copperweld and Regal rely involve similar factual situations, where an exclusive supplier or distributor of a particular product in a particular area is replaced by someone else and claims that his replacement violates section 1. *See, e.g., Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1978).[3] These cases differ markedly from other antitrust cases in the sense that the plaintiffs in these cases could not rely on factors traditionally used to establish

[3] The other cases on which Copperweld and Regal rely simply do not support the proposition for which they are cited. *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 32 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978), states that evidence of market share is relevant, but it does not state that such evidence is necessary to a determination of whether there is an unreasonable restraint of trade. *Robert's Waikiki U-Drive, Inc.* v. *Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199, 1219 (D. Hawaii 1980), concerns section 2 of the Sherman Act, not section 1, and is, therefore, irrelevant to the present case.

that a restraint is unreasonable; there was no reduction in the number of competitors (the plaintiff in each of these cases remained in business), no change in the quantity or quality of goods in the market, and no change in the price of goods as a result of the substitution of one distributor or supplier for another. In apparent recognition of the uniqueness of these cases, courts have held that, unless the former supplier or distributor can establish that the new supplier or distributor was a dominant force in the market before the substitution and has achieved near-monopoly power as a result of the substitution, there is no unreasonable restraint of trade. *See Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp., supra* at 1005-06; *Havoco of America, Inc.* v. *Shell Oil, Inc., supra* at 558-59; *Northwest Power Products, Inc.* v. *Omark Industries, Inc., supra* at 90.

Nothing in these cases suggests that where, as in the present case, the factors traditionally relied upon in determining whether a restraint is unreasonable are present, the plaintiff, in order to prevail, must also establish that the defendant increased its dominance of the relevant market. To require proof of market dominance in addition to evidence of other effects on competition would be to engraft section 2 onto section 1 of the Sherman Act. Furthermore, there are innumerable cases in which courts have found an unreasonable restraint of trade without proof that the defendants enjoyed a dominant position in the market. Consequently, the defendants are incorrect in their assertion that a plaintiff must prove that the defendants enjoyed both a dominant share of the market before the allegedly unlawful conduct occurred and a near-monopoly power thereafter. Similarly, Copperweld and Regal are mistaken in their contention that they could have successfully defended in the present case simply by establishing that they did not enjoy a dominant share of the market prior to 1973 and that they subsequently posed no threat of monopolization. The exclusion of additional evidence regarding the defendants' market share, therefore, was not error.

COUNT III. THE TORTIOUS INTERFERENCE CLAIM

Copperweld seeks judgment n.o.v. on the ground that the conduct on which liability is based was privileged, since its letter to Yoder was sent in a good faith attempt to protect a legally recognized interest that it believed might otherwise have been impaired.[4]

> 1) that the Court erroneously instructed the jury that Copperweld's conduct was privileged only if its primary purpose was to protect a legally recognized interest,
>
> 2) that the Court erroneously instructed the jury on how it was to ascertain Copperweld's "good faith" and "honest belief" or lack thereof, and
>
> 3) that the Court made erroneous evidentiary rulings and prejudicial comments in the presence of the jury thereby crippling Copperweld's attempt to establish that its February 19, 1973, letter to Yoder was not the cause of Yoder's breach of contract.

Privilege under § 773 of the Restatement of Torts

Section 773 of the Restatement (Second) of Torts provides:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Although no Illinois courts have expressly relied on this section of the Restatement, it probably accords with Illinois

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[4] Copperweld also contends that it is entitled to judgment n.o.v. because the conduct on which the tortious interference claim is based is privileged under the First Amendment. This argument was discussed earlier.

law. Illinois courts have frequently cited other sections of the Restatement concerning tortious interference with contract, including sections that deal with privileges. *See, e.g, Candalaus Chicago, Inc.* v. *Evans Mill Supply Co.*, 51 Ill.App.3d 38, 48, 366 N.E.2d 319, 326-27 (1st Dist. 1977).

Copperweld argues that the evidence, even when viewed in the light most favorable to Independence, establishes that, under section 773, it was privileged to induce Yoder to breach its contract with Independence. The legally protected interests Copperweld allegedly was preserving in writing to Yoder was its exclusive right to the trade secrets, confidential business information, etc., that it acquired from Lear Siegler. Moreover, according to Copperweld, its letter to Yoder was a proper means of protecting this right, its threat to protect its trade secrets was made in good faith, and it honestly believed that it might lose its trade secrets unless it informed Yoder of its intention to seek injunctive relief against Mr. Grohne or Independence.

As Independence points out, however, the jury could reasonably have concluded from the evidence in this case that Copperweld did not have any trade secrets, confidential business information, or other legally protected interest. It was uncontroverted that Mr. Grohne was not bound by any non-compete agreement and Copperweld introduced no evidence that it had any trade secrets or any other confidential information. Additionally, there was evidence that there were no trade secrets in the steel tubing industry. There also was evidence that Copperweld's so-called confidential information was not treated confidentially; there was testimony to the effect that the information was indiscriminately made available to all employees and that employees freely copied the allegedly confidential documents and removed them from Regal's plant long before Independence came into being.

Copperweld's argument that "the existence of a 'legally protected interest' under § 773 is established by [its] honest belief that its rights might be violated, even if that belief

was mistaken" is erroneous in three respects. First, it presupposes the existence of legally protected rights: it assumes that there are rights about which Copperweld can have an honest belief. Second, Copperweld's argument confuses two elements of section 773. The reference in that section to one's honest belief is not to one's belief that he has certain rights but to his belief that the rights, which he undeniably has, may be violated. In each of the cases on which Copperweld relies, there was a clearly recognized right which the defendant sought to protect; the only question was whether the defendant honestly believed that the right was in jeopardy. *See, e.g., Hahn & Clay v. A. O. Smith Corp.*, 320 F.2d 166, 169 (5th Cir. 1963); *Dinkins v. General Aniline & Film Corp.*, 214 F.Supp. 276, 280 (S.D.N.Y. 1962). Finally, even if one could establish that he has a legally protected interest simply by establishing that he honestly believed he had such an interest, there is evidence in this case—which is discussed in greater detail below—from which the jury reasonably could conclude that Copperweld could not honestly believe that it had any legally recognized right which it honestly believed it had to protect by its conduct.

As Independence also points out, the jury reasonably could have concluded from the evidence that Copperweld's alleged efforts to protect its rights were not undertaken in good faith. Evidence was presented at trial that Copperweld's own attorneys had told Copperweld that neither Mr. Grohne nor Independence was subject to a non-compete agreement. There was some evidence suggesting that Copperweld knew it had no trade secrets or confidential information that Mr. Grohne might use at Independence. More importantly, there was considerable evidence that Copperweld's purpose in writing to Yoder was not to protect its ability to secure an injunction against Mr. Grohne or Independence but to frighten or discourage Yoder from doing business with Independence in order to prevent or delay its entry into the market. Although, as Copperweld emphasizes, Mr. Smith and Copperweld's attorneys testified "distinctly and

unambiguously" that their sole purpose in writing to Yoder was to notify it of Copperweld's intention to seek injunctive relief, there is circumstantial evidence, as discussed later, from which a jury could conclude that Mr. Smith's testimony was untrue.

Finally, there is evidence in the record from which the jury could reasonably conclude that a third element of privilege was absent in this case: an honest belief that Copperweld's ability to secure an injunction against Independence or Mr. Grohne might be impaired unless it warned Yoder in advance of its intention to seek such relief. Counsel could cite no authority for the contention that Independence through Yoder could somehow defend against a claim that Copperweld's rights under its purchase contract with Lear Siegler would be irreparably damaged unless Independence was enjoined from competing with or using trade secrets of Regal. The contention that a creditor of a defendant in an injunction proceeding has either the standing or the right to challenge the issuance of an injunction against its debtor is apparently novel. Yet this is the only basis on which Copperweld could have honestly believed it had to send notices to possible suppliers and creditors of Independence. The jury could have concluded that Copperweld knew or should have known that such a warning was not a necessary, or even helpful, prelude to its seeking injunctive relief. For these reasons, therefore, we conclude that Copperweld is not entitled to judgment n.o.v. on the tortious interference with contract claim.

Copperweld's Primary Purpose in Writing to Yoder

Copperweld asserts that the Court erred in refusing to instruct the jury that, if it found that Copperweld acted with a proper business purpose in writing to Yoder, then it must find in Copperweld's favor on the tortious interference claim, regardless of whether Copperweld had other motives or purposes for writing to Yoder. In other words, Copperweld contends that the jury should have been told that, unless

Copperweld's sole motivation in writing to Yoder was to injure Independence, Copperweld's actions were not tortious.

The comments to sections 766 and 767 of the Restatement (Second) of Torts are helpful in resolving this contention. Comment j to section 766, the section that defines tortious interference with contract, states:

> The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, *even though he acts for some other purpose in addition.* [Emphasis added.]

Comment d to section 767, the section that sets out factors relevant to determining whether interference was improper, elaborates:

> In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.
>
> *The desire to interfere with the other's contractual relations need not, however, be the sole motive.* If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances. [Emphasis added.]

These comments indicate that it was not necessary, as Copperweld alleges, that Independence prove that Copperweld's sole motive in writing to Yoder was to injure Independence. In fact, the Restatement's comments suggest that our instruction that Independence had to prove Copperweld's principal purpose was improper placed a greater burden of proof on Independence than required by the Restatement. Consequently, our instruction concerning Copperweld's purpose in writing to Yoder was not erroneous.

"Good Faith" and "Honest Belief" Instructions

Copperweld contends that the Court erred in refusing to instruct the jury that they could find a lack of good faith—an essential element of Copperweld's asserted privilege under section 773—"only if you are satisfied that the sole and exclusive purpose for the letter was malicious, meaning that it was sent strictly to cause injury to the plaintiff." Copperweld also contends that the Court erred in refusing to instruct the jury that it need not find that Copperweld had a legally recognized right, which it attempted to protect when it wrote to Yoder about possible litigation, but that it need only find that Copperweld honestly believed that it had a legally recognized right. Copperweld's first argument is merely a rehash of its earlier argument regarding our instruction on Copperweld's motives. Furthermore, Copperweld's second argument fails for the reason discussed earlier in relation to its motion for judgment n.o.v.: Copperweld's "honest belief" is an issue only with respect to whether the rights it had were being violated, not with respect to whether it had any rights. Consequently, our refusal to instruct the jury on Copperweld's "good faith" and "honest belief," as Copperweld requested, was not error.

Prejudicial Comments and Rulings

Copperweld asserts that, but for numerous erroneous evidentiary rulings and prejudicial comments made by the Court in the presence of the jury, it would have been able to establish that Yoder breached its contract with Independence for financial reasons wholly unrelated to the letter it received from Copperweld. Although Copperweld lists the alleged errors and prejudicial comments it does not discuss them in any detail in its brief.

Most of the evidence which was excluded concerned Yoder's problems in securing adequate financing for the construction of the mill and Yoder's original underestimates of the costs of construction. The ground for exclusion of this evidence was that it was irrelevant. The evidence would

have tended to substantiate some of the testimony of Yoder officials that the company's cancellation of the contract was prompted in part by fear that the project was financially impracticable. Even if relevant, however, it would have been cumulative. Copperweld was allowed to introduce substantial evidence concerning Yoder's negotiations with banks for financing, the inaccuracy of cost estimates used in preparing bids, profit margins, borrowing limitations, escrow agreement requirements, progress payments, and so forth.

Additionally, the allegedly prejudicial comments are not prejudicial. Most of the "comments" cited by Copperweld were actually questions we put to witnesses. For example, Copperweld objects to our asking one witness, "what's the difference between cancelling an order and cancelling acceptance of an order?" and to our asking a Yoder officer, "between the $250,000 you were going to get from Capital Bank, plus stretching out the payment to suppliers, plus diverting some of the normal cash flow to the cost of building this machine, [you were] satisfied that they could build it. Isn't that right?" As Independence points out, "[t]he answers to the Court's questions, not the questions themselves, were the only statements prejudicial to Copperweld." The remaining comments do not reflect any bias or prejudice.

Furthermore, we gave a corrective instruction which should have minimized any possible prejudicial effect our comments and questions might have had:

> I have asked thousands of questions in almost twenty years as a judge, but each one of them was designed to help either the jury if there was a jury, or me if there was no jury. . . . And as frequently happens, and I think it happened in this case, sometimes I asked questions, the answers to which were helpful to the plaintiff; and sometimes I asked questions, the answers to which were helpful to the defendants. And I didn't know in advance which side they might be helpful to when I asked them, but I thought they would be helpful to you. They

> were questions which I would have asked if I were trying this case without a jury. . . .
>
> But do not attempt to draw any conclusions about my opinions of this case from the questions which I asked.

Tr. 8449-50. Consequently, there is no merit in Copperweld's argument that erroneous evidentiary rulings and prejudicial remarks by the Court prevented it from asserting a valid defense to the tortious interference charge.

Proximate Cause Instruction

Finally, Copperweld contends that the Court erred in failing to instruct the jury on proximate cause. This objection is somewhat mysterious, since the jury *was* instructed on what constitutes proximate cause. *See* Tr. 9508-10. Although the instruction came several pages after our general instruction on tortious interference with contract, we specifically stated that the definition applied to all claims in which proximate cause was an element. There is no basis, therefore, for Copperweld's objection in this regard.

COUNT VI: THE COMMERCIAL DEFAMATION AND TORTIOUS INTERFERENCE WITH A BUSINESS RELATION CLAIM

With respect to Count VI, Regal argues that the statute of limitations bars Independence's defamation claim. Normally, the statute of limitations begins to run when the alleged defamatory remarks are published. In some cases, however, Illinois courts have held that the statute of limitations does not begin to run until the person who is injured by the remarks learns or should have learned of the defamation. Regal points out that Ms. Lang, an employee of Deere Plow & Planter Works, testified that she first told Independence about the disparaging remarks in June or July, 1975. As a result, the one year statute of limitations began to run, according to Regal, in the summer of 1975 when Independence learned about the defamatory remarks and, thus, expired prior to Independence's bringing suit.

Regal's argument is defective in several respects. First, Regal ignores the fact that it stipulated early in the trial that Independence first learned of the defamation and the source of the remarks in December 1975, less than a year before this suit was filed. *See* Tr. 149. Second, even if one ignores the stipulation, it is not clear that Independence first learned of the defamation in the summer of 1975 as Regal contends. On the contrary, Ms. Lang testified that she told Independence at that time about rumors she had heard concerning its financial condition but she did not identify Mr. Bishop or any other Regal employees as the source of these rumors until December 1975. Thus, until December 1975, less than a year before it filed this action, Independence did not have enough information to enable it to file suit against Regal. Third, the jury found Regal guilty not only of defamation but of tortious interference with a business relationship, which is covered by a two-year statute of limitations. *See* Ill.Rev.Stats. Ch. 83, § 15. The damages arising from both claims are identical. Thus, regardless of whether the defamation charge is barred by the statute of limitations, the claim of tortious interference with a business relationship clearly is not, and Regal remains liable for the damages stemming from Mr. Bishop's false statements to Deere.

Regal also argues that the "discovery rule," which provides that the statute of limitations does not begin to run until the plaintiff discovers or should have discovered the defamation, should not be applied in the present case. Regal contends, although its contention is open to doubt,[5] that

[5] Regal cites only one case in support of its contention, *Kakuris* v. *Klein*, 88 Ill.App.3d 597, 410 N.E.2d 984 (1st Dist. 1980). In *Kakuris*, however, the issue was *not* whether or not the discovery rule should be applied to permit the plaintiff to bring an otherwise stale claim, but whether or not a new claim advanced in an amended complaint "related back" to the original complaint. *Id.* at 603, 410 N.E.2d at 988-89. Consequently, *Kakuris* does not support Regal's contention. We have found no Illinois cases in which a court refused to apply the discovery rule, although the court in *Tom Olesker's Exciting World of Fashion, Inc.* v. *Dun & Bradstreet,*

(footnote continued on next page)

whether the discovery rule should be applied in a particular case depends upon the facts of that case. Where the lapse of time between the alleged defamation and the plaintiff's discovery of it has prejudiced the defendants' ability to marshall evidence in support of his claim, application of the discovery rule to extend the statute of limitations would be inequitable. In the present case, however, Regal apparently was not prejudiced in its defense by the lapse of time. First, the lapse was not great—six or seven months at most. Second, although Regal places great emphasis on Ms. Lang's inability to remember Mr. Bishop's exact words, it concedes that she remembered the general substance of his remarks. It is unlikely that Ms. Lang's memory at the time of trial would have been significantly better had this suit been initiated six or seven months earlier. Thus, this is not a case in which it would be inequitable to apply the discovery rule. Moreover, even if we were to refuse to apply the discovery rule in this case and were to hold that the defamation claim was barred by the statute of limitations, Regal would remain liable for the damages Independence sustained as a result of Mr. Bishop's false statements by virtue of the jury's verdict on the tortious interference with a business relationship claim.

DAMAGES

Copperweld and Regal contend that they are entitled to a new trial on damages for the following reasons:

> (1) the admission of the testimony of Dr. Madansky, the plaintiff's principal witness on damages, was erroneous because he was not an expert and because his tes-

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(footnote continued from preceding page)

Inc., 61 Ill.2d 129, 334 N.E.2d 160 (1975), which first applied the discovery rule in a defamation case, hinted in dictum that the rule might not apply where the defendant's ability to defend was prejudiced by the passage of time. *Id.* at 137, 334 N.E.2d at 164.

timony was based solely on unfounded and uncorroborated assumptions, speculation, and conjecture,

(2) the refusal to instruct the jury that recoverable damages are limited to those directly traceable to "antitrust injury,"

(3) the refusal to instruct the jury on the degree of certainty to which damages must be proved, and

(4) the failure to instruct the jury about treble damages.

Copperweld and Regal further contend that they are entitled to judgment n.o.v. with respect to damages because:

(1) lost profits from a new business are too speculative to be allowed as an element of damages, and

(2) there is no basis in the record for an award of damages in this case.

Dr. Madansky's Testimony

Copperweld and Regal contend that Dr. Madansky, Independence's principal witness on damages, should not have been permitted to testify because he is not an expert and because his testimony was based solely on unfounded assumptions and speculation. With respect to Dr. Madansky's expertise, the defendants assert that he is not an economist but a statistician, and that he has had no previous experience with the structural steel tubing industry. With respect to the basis for Dr. Madansky's testimony, the defendants question the logic of his "pull back" or "before and after" methodology. This methodology is based on the assumptions that the development of a firm's market share and production level relative to the rest of the industry will follow the same pattern no matter when the firm enters the market and that, therefore, the history of an established firm's development can be used to predict how it would have developed had it entered the market sooner than it did. The defendants charge that this methodology frequently has been disap-

proved as too speculative. The defendants also challenge the foundation for several of Dr. Madansky's other assumptions.

That Dr. Madansky is a statistician, or, more accurately, an econometrist, rather than an economist does not make him any less of an expert on damages. Additionally, Dr. Madansky's lack of experience with the structural steel tubing industry does not disqualify him as an expert.

The defendant's complaints with regard to the bases for Dr. Madansky's testimony also are not grounds for excluding his testimony. Contrary to the defendants' assertion, Dr. Madansky's methodology has not been disapproved as too speculative[6] but, rather, it or variations on it have been used frequently in antitrust cases. *See, e.g., Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 580-81 (5th Cir. 1980). Furthermore, there is evidence in the record to support the assumptions on which Dr. Madansky relied in making his projections; there is evidence that the Yoder mill would have been delivered by December 1973, that Independence would have produced 264 tons its first month of operation, that the "start-up" time was five months, that Independence could have secured sufficient steel in 1973 and 1974, that Independence would have maintained a full, trained staff by

[6]The cases which the defendants cite as support for the proposition that the "before and after" or "pull back" methodology has been disapproved are miscited. In *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975), the court concluded that there was insufficient evidence to support the jury's verdict on damages not because the plaintiff's expert had used a "pull back" methodology for estimating damages but because the expert had made no effort to ascertain whether the lost profits the plaintiff had suffered were due to unlawful competition or to lawful competition. *Id.* at 1353. The court specifically approved the expert's methodology, stating that "[u]se of projections is entirely acceptable as long as the projections lead to a reasonable estimate of damages caused by the alleged violations." *Id.* at 1353. *See also Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 863-64 (N.D.Cal. 1979); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F.Supp. 410, 424 (N.D.Cal. 1978).

May 1974, that Independence would have sold its goods at premium prices, and that Independence could have obtained adequate financing to operate at capacity in 1973 and 1974. It is irrelevant to the question of the admissibility of Dr. Madansky's testimony that the evidence underlying these assumptions was vigorously disputed. *See Terrell* v. *Household Goods Carriers Bureau*, 494 F.2d 16, 24 (5th Cir. 1974), *cert. denied*, 419 U.S. 987 (1974). The extent to which the evidence supporting these assumptions was creditable is a matter for the defendants to argue and the jury to consider in judging the weight to be given to Dr. Madansky's testimony. *See id.* at 24; *Lehrman* v. *Gulf Oil Corp.*, 1974-2 Trade Cases ¶75,236 (5th Cir. 1974).[7] In summary, there was no error in admitting Dr. Madansky's testimony.

Damages Traceable to "Antitrust Injury"

Copperweld and Regal argue that the Court erred in refusing to instruct the jury that recoverable damages are limited to those directly traceable to "antitrust injury." The defendants are correct that the plaintiff can recover only those damages that are traceable to their anticompetitive conduct. *See, e.g., Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1136 (5th Cir. 1979), *reversed and remanded on other grounds*, U.S. (May 18, 1981). In the cases on which the defendants rely, the plaintiffs were not kept out of the market entirely by the defendants' unlawful conduct but their business suffered substantial losses during the period the conspiracy existed. The courts held in those cases that the plaintiffs might not recover *all* of the losses they suffered during the conspiracy, since some of those losses might be due to lawful competition or other factors and not to the defendants' unlawful activities. But, the plaintiffs could recover that portion of their losses attributable to the conspiracy. *See, e.g., Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d

[7] Moreover, it should be noted that the defendants were somewhat successful in attacking Dr. Madansky's conclusions, since the jury's award of damages was substantially less than the damages that Dr. Madansky calculated.

1338, 1353 (3d Cir. 1979); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 864 (N.D.Cal. 1979). Unlike *Coleman* and *Murphy Tugboat*, however, there is no question here that the losses Independence suffered are directly traceable to the defendants' unlawful conduct, since the defendants succeeded in excluding Independence from the market entirely; all the losses Independence suffered are attributable to the defendants' conduct because Independence did not have the opportunity to suffer losses at the hands of lawful competition. Consequently, there is no basis for Copperweld and Regal's claim that the jury was improperly instructed with respect to "antitrust injury."

The Certainty with which Damages Are Proved

Copperweld and Regal charge that the Court erred in failing to instruct the jury on the degree of certainty to which the damages must be proved. They object to the following instruction:

> Now, while Independence has a burden by a preponderance of the evidence, it does not have to establish the exact or the precise dollars and cents amount of its damages. We are, as you know, dealing with estimates and projections of sales, of costs, of profits, and it is not possible, accordingly, and Independence does not have to, prove the exact amount, or even a substantially exact amount, of the damages, or to establish them with mathematical accuracy.
>
> • • • • •
>
> As I have already stated, you are not to award damages which are pure speculation, guesswork or conjecture. But you may consider estimates and reasonable approximations to the extent necessary to determine Independence's damages as long as there is a sufficient basis in the evidence from which your estimate can reasonably be inferred.

Tr. 10660-10664.

This instruction, say the defendants, is a virtual direction to the jury to estimate damages and to ignore the rule of law that damages must be established with reasonable certainty by a preponderance of the evidence.

The defendants' argument is incorrect. It is well established that, insofar as antitrust damages are concerned, the plaintiff must establish the reasonable probability of some connection between the defendants' unlawful conduct and some loss to the plaintiff; if the plaintiff succeeds in establishing this connection, however, the jury is entitled to make a "just and reasonable estimate of the [amount of] damage." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 461 F.Supp. 410, 424 (N.D.Cal. 1978). *See also Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2nd 575, 580 (5th Cir. 1980). Furthermore, we specifically instructed the jury that Independence had the burden of proving its damages by the preponderance of the evidence. Consequently, the instructions on computation of damages were not improper in any respect.

Treble Damages

Copperweld and Regal next argue that the jury should have been instructed that the Court would treble its verdict on damages. According to the defendants, publicity regarding antitrust cases in recent years has created a risk that, without a cautionary instruction, jurors will treble their damage calculation.

It is within the discretion of the trial court, however, to give or not to give an instruction concerning treble damages. Additionally, many courts believe that instructing the jury about treble damages is inadvisable, since it may induce the jury to lower its verdict. *See, e.g., Noble* v. *McClatchy Newspapers*, 533 F.2d 1081, 1090-91 (9th Cir. 1975), *cert. denied*, 433 U.S. 908 (1977) (error for trial court to instruct the jury that their damage award would be trebled). More importantly, the defendants in this case clearly were not prejudiced by the Court's refusal to instruct the jury regarding treble damages.

As the Court informed the parties, the foreman of the jury in response to an inquiry from the Court, prompted by the fact that the judgment was mathematically divisible by three, advised that the jury determined single damages by reference to Independence's actual operating results and did not treble their damage calculation.

Lost Profits as an Element of Damages

Copperweld and Regal contend that they are entitled to judgment n.o.v. on the ground, first, that lost profits of a new business enterprise, like Independence, are too speculative to be allowed as a recoverable item of damage under the antitrust laws and under Illinois law.

As for the antitrust law, innumerable cases have held that a business excluded from the market as a result of other businesses' unlawful conduct can recover lost profits for the period it was excluded. *See, e.g., Midessa Television Co.* v. *Midessa Telecasting Co.*, 617 F.2d 1141, 1144 n.6 (5th Cir. 1980), *cert. denied*, U.S. (1981); *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97, 106 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968). There is no reason why a new business which is excluded from the market for a period of time should not recover reasonably probable lost profits. In most if not all antitrust cases, the precise amount of damages is difficult to calculate. In antitrust cases, the risk of uncertainty in the calculation of damages lies with the wrongdoer. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Where a new business, rather than an established business is injured, the damages may be more difficult to ascertain with precision. It is inconceivable, however, that simply because the calculation may be less precise, the wrongdoer should be relieved of liability. A new business like Independence can recover lost profits as damages provided that, as in this case, there is a reasonable basis for establishing the amount of its damages.

Moreover, the cases that Copperweld and Regal cite in support of their proposition that lost profits are not recover-

able in antitrust cases are inapposite. Most of the cases are not antitrust cases. *See McBrayer* v. *Teckla, Inc.,* 496 F.2d 122 (5th Cir. 1974) (diversity case); *Putnam* v. *Lower,* 236 F.2d 561 (9th Cir. 1956) (admiralty case); *Sambo's of Ohio, Inc.* v. *City Council of City of Toledo,* 466 F.Supp. 177 (N.D.Ohio 1979) (civil rights case in which the plaintiff sought injunctive relief rather than damages). And, the reference to new businesses' damages in the remaining case is unsupported dictum. *See Roseland* v. *Phister Mfg. Co.,* 125 F.2d 417 (7th Cir. 1942).

As for Illinois law, the cases that Copperweld and Regal cite in support of their claim that lost profits are not recoverable are equally unconvincing. The reference to such a rule in one of the cases is dictum, *see Rhodes* v. *Sigler,* 44 Ill.App. 3d 375, 357 N.E. 2d 846 (3d Dist. 1976); in the other case, the court reversed the damages award because of the absence of evidence supporting it. *See Tonchen* v. *All-Steel Equipment, Inc.,* 13 Ill.App.3d 454, 300 N.E.2d 616 (2d Dist. 1973).

Support for the Damage Award

Copperweld and Regal further contend that they are entitled to judgment n.o.v. on the ground that there is no basis in the record for the jury's award of damages if Dr. Madansky's tesitmony were excluded, as they believe it should be. But, since, as discussed previously, it was not error to admit Dr. Madansky's testimony this contention fails as well.

THE COUNTERCLAIM

The defendants asserted in their counterclaim that Independence engaged in a systematic plan to induce Regal employees to leave Regal's employment for Independence in order to obtain trade secrets and confidential information from Regal and to interfere with Regal's operations. At the conclusion of the trial, the Court directed a verdict in favor of Independence. The defendants now argue that the Court erred in excluding the testimony of three Regal employees and in excluding evidence that Mr. Grohne took confidential

and financial information when he left Regal. They also argue that, even without this testimony, there was sufficient evidence of malicious interference with a business relationship to let the claim go to the jury.

Excluded Testimony

Copperweld and Regal argue that the Court improperly excluded the testimony of Ms. Ratkovich and Mr. Larsen, two Regal employees who allegedly were invited by Mr. Grohne to leave Regal for Independence but resisted the temptation. Their testimony, according to the defendants, was probative of Mr. Grohne's systematic attempts to "raid" Regal.

We found, however, that Ms. Ratkovich's and Mr. Larsen's testimony was not relevant to the defendants' claim. Ms. Ratkovich testified before the jury about a conversation she had with Mr. Grohne in 1976. During this conversation, by Ms. Ratkovich's admission, Mr. Grohne never offered her a job, never mentioned Independence, never asked her if she wanted to work for Independence, and never told her that there would be a position for her with Independence. Ms. Ratkovich attempted to testify to her "understanding" that Mr. Grohne's call to her was an invitation to join Independence but this testimony was excluded for obvious reasons and thereafter her previous testimony was properly stricken as irrelevant. Mr. Larsen testified, in a deposition which was not read to the jury, that Mr. Grohne asked him whether he would consider working for Independence. Mr. Larsen was not offered any inducement to leave Regal. Moreover, he was not, strictly speaking, an employee of Regal but an independent sales agent at the time of his conversation with Mr. Grohne. Thus, Mr. Larsen's testimony was also properly excluded as irrelevant.

The defendants also object to the exclusion of Mr. Campion's testimony. Mr. Campion, the Chairman and President of Lear Siegler, would have testified concerning Mr. Grohne's intent at the time he left Regal and Lear Siegler.

This testimony is crucial, according to the defendants, because it contradicts Mr. Grohne's "self-serving" statements regarding his reasons for leaving his former employer. Mr. Grohne's intentions upon leaving Regal and Lear Siegler in mid-1972 are at best only marginally relevant to his intentions in 1973 and 1974. Moreover, Mr. Campion was not competent to testify to Mr. Grohne's intentions. Nor did Mr. Grohne owe any duty either to Lear Siegler or Copperweld to disclose what his intentions were with respect to his employment after the acquisition of Regal by Copperweld. Exclusion of his testimony, therefore, was not error.

Finally, the defendants object to the exclusion of testimony to the effect that Mr. Grohne took confidential business information and trade secrets when he left Regal and that his purpose in inducing Regal employees to work for him was to obtain additional information of this sort. The defendants failed to establish, however, that the information Mr. Grohne allegedly obtained contained any trade secrets or business data which was treated confidentially. In fact, testimony presented at trial suggested that the opposite was true. They also failed to establish that Mr. Grohne employed any of this information at Independence. In the absence of any evidence that the information was confidential or that it was ever used, testimony that Mr. Grohne took it was irrelevant. *Cf. Ancraft Products Co.* v. *Universal Oil Products Co.*, 84 Ill.App.3d 836, 843, 405 N.E.2d 1162, 1167-68 (1st Dist. 1980). The testimony was, therefore, properly excluded.

Sufficiency of the Evidence

Even without the excluded evidence discussed above, the defendants assert that there was sufficient evidence that Mr. Grohne maliciously induced Regal employees to terminate their employment to send the issue to the jury. They object, therefore, to the Court's directing a verdict in the plaintiff's favor.

To establish a prima facie case of tortious interference with an employment relationship the defendants must estab-

lish the existence of a valid employment relationship, knowledge on the part of Mr. Grohne, the interfering party, of this relationship, "intentional and malicious interference inducing or causing a breach or termination of the relationship," and damage. *See Ancraft Co.* v. *Universal Oil Products Co.*, 84 Ill.App.3d 836, 844, 405 N.E.2d 1162, 1168 (1st Dist. 1980). Copperweld and Regal failed, however, to produce evidence of at least two of these elements: that Mr. Grohne's interference was malicious or that Regal was damaged.[8]

As proof of malicious interference, the defendants rely heavily on Mr. Grohne's invitations to several Regal employees to leave Regal and join Independence. Copperweld and Regal produced evidence suggesting that Mr. Grohne approached Mr. Uzarowicz while the latter was working for Green Bay Tube and offered him a job at Independence. There is also evidence that Mr. Janonis, shortly before he left Regal for Independence, was told by an Independence employee that an advertisement for a job in which Mr. Janonis might be interested would be appearing shortly in the newspaper. With regard to Mr. Kwarta and Mr. Bauer, the evidence, even when viewed in the light most favorable to the defendants, indicates simply that they applied to Independence for a job and that Mr. Grohne hired them; there is no evidence that either Mr. Kwarta or Mr. Bauer were solicited by Mr. Grohne or any other Independence employee.

In *Ancraft Co.* v. *Universal Oil Products Co., Supra,* similar invitations were held not to constitute tortious interference. In that case, the defendant had asked one of the plaintiff's

[8] With respect to Mr. Uzarowicz, there is also no evidence of an employment relationship between Mr. Uzarowicz and either Regal or Copperweld at the time Mr. Grohne allegedly induced him to join Independence. Mr. Uzarowicz was employed by Green Bay Tube between the time he left Regal and the time he joined Independence. There is also no evidence of damage to Regal or Copperweld as a result of Independence's employing several of their employees.

employees if he had "given any thought to leaving" his present employer and coming to work for the defendant. The court held that a conversation of this sort, alone, could not be characterized as inducement, much less tortious inducement. *Id.* at 845, 405 N.E.2d at 1169. Similarly, in *TAD, Inc.* v. *Siebert,* 63 Ill.App.3d 1001, 380 N.E.2d 963 (1st Dist. 1978), the defendants, who had once worked for the plaintiff, contacted eighteen of the plaintiff's employees, offered them jobs, offered them better salaries, and attempted to persuade them to join the defendants' new firm. The court in that case held that the defendants' actions did not constitute tortious interference, as it explained:

> [T]here is no evidence of any malicious conduct on the part of defendants who, . . . offered higher salaries to a number of personnel under contract to plaintiff. It is not apparent that defendants made any false representations, threats, or engaged in any surreptitious conduct which induced any personnel to terminate their employment contracts with the plaintiff.

Id. at 1006-07, 380 N.E.2d at 967.

When the evidence with regard to Messrs. Uzarowicz, Janonis, Kwarta and Bauer is compared with that in *Ancraft* and *TAD, Inc.*, it is apparent that there is no evidence in this case of malicious interference with an existing employment relationship. There is no evidence that Mr. Grohne made any false representations to these employees, threatened them in any fashion, or engaged in any surreptitious conduct.

The defendants' alternative theories of malicious inducement are equally unconvincing. First, they claim that malicious inducement exists here because Mr. Grohne's inducement of several employees to work for him had the "Indirect purpose of injuring [Copperweld and Regal] or benefitting [Independence] at [their] expense." Even if this theory is an accurate statement of the law—and it clearly is not in light of *Ancraft* and *TAD, Inc.*—there is no evidence

that Copperweld and Regal were injured or that this was Mr. Grohne's purpose in hiring the former Regal employees. Second, the defendants claim that malicious inducement exists because Mr. Grohne's purpose in wooing their employees was to obtain confidential business information. Again, however, there is no support in the record of this contention.

In the absence of evidence supporting the defendants' claim of malicious inducement, there was no error in directing a verdict in Mr. Grohne's favor on the counterclaim.

PREJUDICIAL COMMENTS

Copperweld and Regal argue that they are entitled to a new trial on the ground that the Court's conduct throughout the trial was extremely prejudicial to the defendants and prevented the jury from reaching a fair and impartial verdict. According to the defendants, the Court repeatedly served as advocate for the plaintiff's cause, made numerous inconsistent evidentiary rulings which invariably favored the plaintiff, and questioned witnesses excessively. As mentioned earlier, the defendants have pointed to approximately 100 rulings and 300 questions or comments which allegedly evidence the Court's bias. They cite our questioning of Mr. Seamans and Mr. Wilson, our comments regarding Mr. Coughlin's attempts to impeach Mr. Norris and Mr. Bruggeman, and our allegedly aiding Mr. Grimm in cross-examining Mr. Breedlove as particularly egregious examples.

It would be pointless to discuss each allegedly prejudicial comment or question in this opinion, since a new trial should be granted not on the basis of isolated remarks but only if the record as a whole reveals a miscarriage of justice. *See Marcoux* v. *Mid-States Livestock, Inc.*, 429 F.Supp. 155, 165 (N.D.Ia. 1977), *aff'd*, 572 F.2d 651 (8th Cir. 1978). As Independence points out, the defendants' citation of the Court's remarks is highly selective and many of the remarks are cited out of context in a manner that makes them appear

prejudicial when they were not. The defendants also overlooked the numerous questions, comments and rulings by the Court that turned out to disfavor Independence, thus creating the illusion that we questioned only the defendants' witnesses and ruled only against the defendants on evidentiary questions. When the entire record is considered, we believe it is clear that we did not favor either side during the trial.

Finally, the defendants overlook that the Court gave a cautionary instruction to the jury at the close of the case, admonishing them not to "attempt to draw any conclusions about my opinions of this case from the questions which I asked." Tr. 8450.

In light of all of the foregoing, we conclude that the defendants' motions must be denied. An appropriate order will enter.

United States District Judge

Dated: June 22, 1981

APPENDIX C

APPENDIX C

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201 — The Honorable Hubert L. Will Presiding Judge

MEMORANDUM OPINION

"For the reasons stated above, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest from the date hereof; the order of June 22, 1981 is vacated; and costs of $92,497.17 plus interest from the date hereof are taxed against the defendants. DRAFT. (SEE DRAFT FOR FULL PARTICULARS.)

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, *Plaintiff,* vs. **COPPERWELD CORPORATION and REGAL TUBE COMPANY,** *Defendants.*	**No. 76 C 4201**

REVISED MEMORANDUM OPINION

After a ten-week, bifurcated trial, a judgment for $7,497,027.00 was entered against the defendants on the plaintiff's antitrust claim, trebling the jury's verdict of $2,499,099.00.[1] On June 22, 1981, we denied the defendants' motion for judgment notwithstanding the verdict or for a new trial.

The plaintiff has filed a petition for attorneys' fees under section 4 of the Clayton Antitrust Act. 15 U.S.C. § 15. The total requested is $1,668,202.25. That amount includes $1,337,402.25 for 17,781.25 hours spent by the plaintiffs' attorneys, both partners and associates; $55,473.75 for 1,749.75 hours spent by law students; $243,564.05 for 8,074.50 hours

[1] A judgment of $15,000.00 was also entered against defendant Regal only for commercial defamation and tortious interference with the plaintiff's relationship with Deere. After the liability trial in which the jury found defendant Yoder Co. guilty of breach of contract, the plaintiff settled with Yoder which is, therefore, no longer a party to this suit.

spent by legal assistants; and $31,762.50 in fees of attorneys, students, and assistants for time spent preparing and litigating the petition for fees and the bill of costs. The plaintiff has also requested an upward adjustment of the award based on the nature of the litigation and the attorneys' skill as well as interest on the award. For the reasons hereinafter stated, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest.[2]

The plaintiff has also filed a bill of costs, requesting $151,892.23. After the defendants filed objections, in accordance with the procedures in this district, our deputy clerk awarded the plaintiff costs of $129,610.10, the total of the amounts requested for deposition transcripts; witness fees and travel expenses; the plaintiff's expert witness fees and expenses; photocopying, charts, and photographs; and docket fees. The clerk disallowed the costs of the transcripts of court proceedings, the defendants' expert witness fees and expenses, and computerized research costs. The parties filed cross motions for review of the clerk's assessment. We held a hearing on October 15, 1981, to discuss with the parties the deficiencies both in the plaintiff's supporting documentation and in the defendants' objections which made it impossible to evaluate which costs should be taxed and which disallowed. At that time, we ordered the plaintiff to submit supplemental material in support of its bill of costs. The plaintiff filed an amended request for $92,791.55, and the defendants then filed further objections. For the reasons hereinafter stated, the clerk's order of June 22, 1981, is vacated, and the plaintiff is awarded costs of $92,497.17, plus interest.

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[2] In their first set of objections, the defendants requested a hearing. On October 15, 1981, we held a status hearing which, although not a formal hearing, provided an opportunity for discussion of the issues raised in the petition. A more extensive hearing is not necessary in this case since a hearing is not an efficient manner to accomplish the minute analysis of time spent which the defendants argue is required.

I. Attorneys' Fees

The accepted method for determining the amount of an award of attorneys' fees begins with the calculation of a so-called lodestar figure by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. That figure is then adjusted up or down depending on the quality of representation and, if a contingency representation, on the risk that the lawsuit might have been unsuccessful and no fee obtained. That method is the simplest and most precise way of considering the twelve generally accepted factors on which a fee award should be based: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of other employment; the customary fee in the community for similar work; the fixed or contingent nature of the fee; time limitations imposed by the client or the circumstances; the amount involved and the result obtained; the experience, reputation, and ability of the attorneys; the desirability of the case; the nature and length of the professional relationship with the client; and awards in similar cases. *See generally, Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D.Ill. 1979); American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106.

A. The Time-Rate Analysis

1. Hourly rates

The rates requested for the partners who worked for the plaintiff on this case range from $85 for the lowest rate for partners in 1976 to $140.00 for the highest rate for partners in 1981. The rates for associates range from $50.00 for the lowest rate in 1976 to $80.00 for the highest rate in 1981.

We find that the hourly rates requested for the plaintiff's attorneys is reasonable in light of the rates customarily charged in the locality and the experience, reputation, and ability of the plaintiff's lawyers. *Cf. In re Folding Carton*

Antitrust Litigation, 84 F.R.D. 245, 265 (N.D.Ill. 1979) ($150.00 maximum hourly rate for attorneys on the plaintiff class executive committee or senior attorneys who made particularly significant contributions to the litigation; $125.00 for committee chairmen and other middle and senior partners who made significant contributions; $75.00 for associates). The rates of the plaintiff's attorneys are comparable to those charged by the defendants' Chicago firm which range from $70.00 in 1976 to $143.00 in 1981 for partners and from $42.00 in 1976 to $98.00 in 1981 for associates.

2. Hours spent

(a)

The defendants contend that an unspecified amount of the time included in the plaintiff's petition cannot be awarded because it represents duplicative work by the plaintiff's attorneys, *e.g.*, attendance by more than one attorney at depositions, motion and status calls, and court hearings. Duplication should not be paid for by the losing party but an item-by-item accounting in a case of any size is unreasonably burdensome. Other courts "have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Northcross* v. *Board of Education*, 611 F.2d 624, 636-37 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). *See also Copeland* v. *Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc). *Cf. Prandini* v. *National Tea Co.*, 585 F.2d 47, 51 (3d Cir. 1978) (court held that, "[a]bsent evidence to support the district court's finding of duplication or overlap, we cannot sustain the 10% fee reduction imposed by the district court.")

From our observation of this case, we conclude that there was some unnecessary and, therefore, noncompensable duplication. On many occasions, two and even three counsel participated in proceedings which could have been handled by one. On the other hand, the magnitude of the case clearly required the services of a number of attorneys as evidenced

by the teams of counsel employed by the defendants. In determining the award, we will reduce the total number of attorney hours requested by ten percent.

(b)

Although at one time the Seventh Circuit held that all time spent on a case is compensable even time spent on claims which the party seeking attorneys' fees lost, *see Sherkow* v. *Wisconsin*, 630 F.2d 498, 504-05 (7th Cir. 1980); *see also Northcross* v. *Board of Education*, 611 F.2d at 636, in its most recent opinions on this subject, the court of appeals has held that attorneys' fees can be awarded only for preparation and presentation of claims on which a party is successful. *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 80-2851 (7th Cir. Nov. 24, 1981); *Busche* v. *Burke*, 649 F.2d 509, 522 (7th Cir. 1981). *See also Muscare* v. *Quinn*, 614 F.2d 577 (7th Cir. 1980). Although these cases involved the Civil Rights Attorneys' Fees Act rather than the Clayton Act, there is no reason to interpret section 4 of the Clayton Act, which awards attorneys' fees to a plaintiff who establishes that he was "injured in his business or property," differently from section 1988 of the Civil Rights Act, which awards attorneys' fees to the "prevailing party." *Compare Busche* v. *Burke*, 649 F.2d at 522 (section 1988) *with Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214 (3d Cir. 1978) (Clayton Act case in which fees were not awarded for hours spent on unsuccessful claims).

Moreover, although the Seventh Circuit has apparently never decided this issue, since it has held that time spent on unsuccessful claims should be distinguished from time spent on successful claims, it probably would also hold that fees should not be awarded for time spent on state law claims, even if those claims were successful, since there is no statutory authority for such an award. *See Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d at 1215-16.

However, although

> no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail . . . . [i]t sometimes will be the case that a lawsuit will seek recovery under a variety of legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the "issue was all part and parcel of one matter," *Lamphere* v. *Brown Univ.*, 610 F.2d 46, 47 (1st Cir. 1979), but only when the claims asserted are "truly fractionable," *id.*

Copeland v. *Marshall*, 641 F.2d at 891-92 and n.18. Similarly, the calculation of time spent on successful claims "presumably includes time spent on unsuccessful claims to the extent such time would have been spent in connection with the successful claims even if the unsuccessful claims had not been brought." 649 F.2d at 522.

Furthermore, time spent on an issue on which a party failed to prevail but which was an aspect of a larger, successful claim, so that the failure affected only the amount of damages due for the claim on which he did succeed but did not affect the finding of liability, is compensable. *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 81-2851, p. 30 (7th Cir. Nov. 24, 1981). In *Syvock*, the plaintiff had succeeded in his claim that the defendant had discriminated against him on the basis of age but failed to prove that he had mitigated his damages or that the defendant had acted willfully. The court held that all time spent on the age discrimination claim was compensable including time spent on the issues of mitigation and willfulness.

(c)

In count III of the complaint in this case, the plaintiff alleged that defendant Yoder Co. had breached a contract with the plaintiff to provide a mill, equipment, and tooling

which the plaintiff would have used to manufacture structural steel tubing. The jury found for the plaintiff on the breach of contract claim. In count IV of the complaint, the plaintiff alleged that defendants Copperweld and Regal had tortiously interfered with the contract between Yoder and the plaintiff. The jury found against these defendants and for the plaintiff on the tortious interference claim. In count I of the complaint, the plaintiff alleged that Yoder's breach of the contract was part of a conspiracy between Yoder, Copperweld and Regal to prevent the plaintiff from entering the structural steel tubing market in violation of section 1 of the Sherman Act. The jury found against Copperweld and Regal on that issue but found that Yoder was not a part of the conspiracy. In support of its section 1 claim, the plaintiff attempted at trial to introduce evidence of functional discounts granted by the defendants to Ryerson. We excluded that evidence. The plaintiff also attempted to show that Copperweld and Regal had conspired in violation of the antitrust laws to interfere with the plaintiff's relationship with Deere Plow and Planter Works. The jury found that there was no conspiracy to interfere with the plaintiff's business relationship with Deere but that Regal alone did interfere with that relationship. Count V of the complaint alleged that the defendants libelled and slandered the plaintiff. The jury found that Regal, but not Copperweld, was liable for commercial defamation. Count II of the complaint stated a claim for monopolization, a violation of section II of the Sherman Act. That count was voluntarily dismissed before trial.

The defendants brought a counterclaim against the plaintiff and its president David Grohne. The counterclaim alleged that the plaintiff had engaged in a systematic plan to induce Regal employees to leave Regal's employment for the plaintiff's in order to obtain trade secrets and confidential information from Regal and to interfere with Regal's operations. At the conclusion of the trial, we directed a verdict on the counterclaim in favor of the plaintiff.

In their objections to the plaintiff's petition for attorneys' fees, the defendants argue that the plaintiff cannot receive attorneys' fees for time spent on state law claims—the plaintiff's defense of the counterclaim, the breach of contract claim, the claims involving Deere, and the tortious interference claim—and that the plaintiff cannot receive attorneys' fees for time spent on the unsuccessful antitrust claims—the claims of conspiracy relating to Deere and Ryerson, the monopolization claim, and the claim of a conspiracy with Yoder. We agree that time spent on those claims is not compensable unless the claims are not "truly fractionable" from the successful antitrust claim. *Lamphere* v. *Brown University*, 610 F.2d 46, at 47 (1st Cir. 1979).

(d)

Under the applicable legal standards, we conclude that the plaintiff is entitled to attorneys' fees for services performed in relation to the counterclaim, the contract claim, the tortious interference claim, the Yoder conspiracy claim, and the monopolization claim because time spent on those claims would have been spent in connection with the successful section 1 claim even if the other claims had not been brought. The defendants' counterclaim against Grohne and the plaintiff was identical to their defense against the plaintiff's section 1 claim: the defendants argued that Grohne's alleged use of trade secrets and inducement of employees both made him liable to the defendants under state law and justified their activities which the plaintiff was claiming violated section 1, thus relieving them from liability under the antitrust laws. Even if the plaintiff had not had to defend the counterclaim, the plaintiff's attorneys would have had to perform the same services to counter the defendants' defense to the section 1 claim. Therefore, time spent on the counterclaim is also compensable.

The defendants argue that the breach of contract claim is separate from the antitrust claim because Coppe:weld and Regal did not defend the antitrust claim on the theory that there was no contract between Yoder and Independence.

This is not totally accurate since they did contend that certain conditions precedent to a contract had not been met. In any event, much of the dispute in the breach of contract suit involved the reason Yoder did not deliver the mill, whether it was a result of pressure by Copperweld and Regal or whether it was due to other factors which had no antitrust implications. Those issues are indistinguishable from the issues in the antitrust claim. Although the plaintiff may not have had to prove the existence of a contract if the breach of contract claim had not been brought, since most of the time spent on the contract claim was directly relevant to the antitrust claim, and since the parsing of compensable from noncompensable time would be an impossible task, fees for most of the time spent on the contract claim will be awarded. The only exceptions are the 60.5 hours spent on the jury instructions relating to the breach of contract claim and the 71.75 hours spent on the Yoder settlement since those relate solely to the contract claim against Yoder.

Similarly, time spent attempting to prove that Yoder was part of the conspiracy will not be excluded from the fee award. All the issues which are a part of that claim—*e.g.*, the contacts between the various defendants, the timing of and the relationship between the various events leading to Yoder's breach of the contract—were as much a part of the antitrust case against Copperweld and Regal as they were part of the case against Yoder.

Although the defendants argue that "significant efforts involved in research, briefing, discovery and trial time" related solely to the tortious interference with the Yoder contract claim, they have not identified how many hours they contend were spent solely on that claim nor given any examples of activity which would not have been performed by the plaintiff's attorneys if only the antitrust claim and not the state law claim had been brought. To prove its antitrust claim, the plaintiff proved, among other things, a tortious interference with the Yoder contract and then

proved a conspiracy. The tortious interference claim, therefore, is "part and parcel" of the antitrust claim, and time spent thereon will be included in the fee award.

Time spent on the plaintiff's withdrawn monopolization claim is also compensable. One of the defendants' defenses to the section 1 claim was that, since they did not have a near-dominant share of the market, even if they had used unfair means to keep the plaintiff out of the market, they did not create the risk of a monopoly and, therefore, there was no unreasonable restraint of trade. Although we rejected that theory at trial, until that time, the plaintiff could not be certain that we would exclude the defendants' evidence of market share and had to be ready to counter that defense by proving the defendants had a large market share. Since that could only be established by doing the same discovery and preparation that would be done to prove a monopolization claim, time spent on the withdrawn monopoly claim is compensable.

The defendants argue that time spent on what they characterize as "market issues for 1975 and 1976" should not be awarded. The plaintiff introduced evidence on the condition of the structural steel tubing market to show restraint of trade. The defendants retort several times that the evidence was rejected by the jury because the jury "specifically found" that the conspiracy ended by 1975. That statement is incorrect. None of the interrogatories answered by the jury contained any dates or asked the jury to find when the conspiracy ended, although the jury did find that certain acts after 1975 were undertaken by Regal alone. Even if the jury had made such a finding, however, the evidence of market structure in 1975 and 1976 was part of the plaintiff's proof of its claim of an antitrust violation in 1974. The restraint of trade and the damages suffered by the plaintiff did not necessarily end when the plaintiff entered the market in 1974 since the delay in its entry had repercussions well after the time it began operation. The size of the jury's verdict clearly implies that it found the effects of the defendants' illegal

activity went beyond the nine months in which the plaintiff was excluded from the market.

Time spent on the Deere claim and the Ryerson issue, however, is not compensable. In *Syvock* v. *Milwaukee Boiler Manufacturing Co.*, 80-2851 (7th Cir. Nov. 24, 1981), the court distinguished between cases in which a party loses only an aspect of a claim so that all time spent on a claim is compensable, and cases in which a party contends that several different actions of the defendants violated the law and in which the party fails to prove that all of the actions were illegal so that only time spent on the successful portions of the case is included in the fee award. Slip op. at 30. Although the plaintiff argues that its allegations relating to Deere and Ryerson were only aspects of its claim that the defendants violated section 1 by conspiring to keep the plaintiff out of the market, the case does not arise, as the plaintiff argues, from one set of facts, and the claims relating to Deere and Ryerson are not simply different theories of recovery based on the same facts as the successful antitrust claim which related to the tortious interference with the Yoder contract. Although all were contained within count I of the complaint, the plaintiff's theory was that any one of the acts of the defendants violated the antitrust laws. Since the plaintiff failed to prove that the defendants' acts with respect to Ryerson were a restraint of trade or that defendant Regal's acts with respect to Deere were done in conspiracy with Copperweld, time spent on those aspects of the case cannot be included in the antitrust fee award. The plaintiff identifies 176.25 attorney hours and 105 legal assistant hours spent on those claims.

The defendants make several miscellaneous objections. They object to including time spent on two motions which were never filed. Although these motions apparently related to issues in the case with respect to which the plaintiff can recover attorneys' fees, the time is not compensable since the motions were never filed. On the other hand, the plaintiff's

research involving the motion to disqualify one of its attorneys is related to the suit as a whole and therefore to the successful antitrust claim, and the plaintiff can receive attorneys' fees for that time. Accordingly, 10.50 hours spent on the unfiled motions will be eliminated. The defendants have noted that 1.25 hours included in the petition were spent at a court appearance in another, unrelated case. That time will also not be included in the award.

The defendants object to any fee award for time spent on the plaintiff's damages claim. Their argument that this work is not legal work, however, is frivolous. Although economic calculations are not legal work, the plaintiff's attorneys apparently left that to their experts and spent the time included in the fee petition gathering information to submit to the expert for analysis and preparing the experts' conclusions for presentation to the jury. Those tasks are clearly part of a lawyer's responsibility.

The defendants also argue that time spent on damages should not be awarded because the plaintiff sought total single damages of $8,298,240.00 but received single damages of only $2,499,009.00. That discrepancy might justify reducing the number of hours awarded but it could not justify eliminating that time from the award altogether; the time was productive in part in that the jury did award substantial damages. Furthermore, the time is compensable under the rule announced by the Seventh Circuit in *Synock* v. *Milwaukee Boiler Mfg. Co.*, 80-2851 (7th Cir. 1981), in that whatever part of the plaintiff's damages claim the jury rejected was an aspect of the larger, successful damages claim and the rejection only affected the amount of damages not the finding that the defendants were liable or that the plaintiff had suffered some damages. It is inevitable that a plaintiff will endeavor to prove the largest possible damages. The amount of time to which the defendants object (2038.75 hours) is not unreasonably large in light of the complexity of proving what damages were caused by the plaintiff's exclusion from the market and will be included in the fee award. Since that

amount does include some unsuccessful effort, however, it will be excluded from the amount to which a multiplier is applied. *See* discussion, *infra*.

The defendants also object to time spent in depositions on noncompensable subjects. Since we have rejected most of their objections regarding which subjects are noncompensable, we will not subtract any additional time for depositions.

Finally, the defendants object to thousands of hours which they claim are not explained in a way which indicates sufficiently the nature of the task on which the time was spent. The defendants, however, do not identify which hours they object to on that ground. Without more specific objections, the plaintiff cannot supply more documentation, and we cannot determine the validity of the argument. We believe it reasonable to place the onus of an item-by-item examination of the plaintiff's time records on the defendants not the court, with the court purusing the records identified in the defendants' objections. In this case, since the defendants have not provided us with sufficient evidence of their objections, we will not subtract any time for entries which the defendants allege they cannot decipher.

B. Adjustment

Whether an award of attorneys' fees should be in an amount above—or below—the lodestar depends on the contingent nature of compensation in the particular case, the complexity of the issues and the quality of the attorneys' representation. *Lindy Brothers Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). The factors considered in evaluating the contingent nature of success are the plaintiff's burden, the risk assumed in developing the case, and the delay in receipt of payment. *Id.*[1] An adjustment due to the quality of representation

[1] In connection with the plaintiff's request for an additional amount above the lodestar, the defendants requested a copy of any fee arrangements between the plaintiff and its attorneys prior to

(footnote continued on next page)

must be made on the basis of a finding that the attorneys' performances were not just good or competent but exceptional and evidenced an unusual degree of skill. *Id.* The quality determination involves a comparison of the potential recovery to the actual recovery and an evaluation of the attorneys' methods of efficient or obstruction tactics. *Id.*

We will apply a multiplier of 1.2 to a portion of the plaintiff's attorneys' fees. The plaintiff's attorneys showed considerable skill in handling this case. The case was complex, and the defendants complicated it by raising a wide variety of issues and a number of novel theories, all of which the plaintiff successfully refuted. We note particularly the defendants' invocation of the so-called "Noerr-Pennington" doctrine to argue that some of their activities were related to their preparation of a possible lawsuit and were therefore protected by the first amendment.[4]

C. Fee Petition and Bill of Costs

The defendants object to that amount of the fee petition which represents time spent preparing the plaintiff's petition for fees and bill of costs and the various memoranda the plaintiff has filed in support of the petition and bill of costs. Fees for services performed in connection with the fee appli-

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(footnote continued from preceding page)

the agreement presently in effect and already produced by the plaintiff. The plaintiff objected to that request and submitted the document for our *in camera* inspection. After examining the documents, we find that it is irrelevant and need not be produced.

[4]The plaintiff requested a multiplier in part due to the protracted nature of the litigation caused by the obstructionist tactics of the defendants. That factor, however, is already reflected in the number of hours billed and awarded. Time spent overcoming, *e.g.*, the defendants' discovery obstacles involved routine legal services which required no exceptional skill and cannot justify a multiplier. Our award of a multiplier, therefore, is not based on that ground.

cation are awarded in civil rights suits. *Johnson* v. *State of Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Gagne* v. *Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir.), *cert. denied*, 444 U.S. 880 (1979); *Prandini* v. *National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978); *Hairston* v. *R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975). The rationale for such an award is that

> [i]f an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased. Recognizing this fact, attorneys may become wary about taking Title VII cases, civil rights cases, *or other cases for which attorneys' fees are statutorily authorized.* Such a result would not comport with the purpose behind most statutory fee authorizations, *viz*, the encouragement of attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies.

Prandini v. *National Tea Co.*, 585 F.2d at 53 [emphasis added]. In *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc.*, 440 F.Supp. 1175, 1179 (W.D.Pa. 1977), *aff'd*, 582 F.2d 1275 (1978), *cert. denied*, 440 U.S. 981 (1979), the court, without discussion, made such an award in an antitrust case.

The cases cited by the defendants in support of their argument that such an award should not be made, *City of Detroit* v. *Grinnell Corp.*, 560 F.2d 1093, 1102 (2d Cir. 1977); *Lindy Brothers Builders, Inc.* v. *American Radiator*, 540 F.2d 102, 111 (3d Cir. 1976), are distinguishable. In those cases, the attorneys were entitled to fees not because of a statutory provision but under the equitable fund theory. That theory provides "that an attorney whose actions have conferred a benefit upon a given group or class of litigants may file a claim for reasonable compensation for his efforts." *City of Detroit* v. *Grinnell*, 560 F.2d at 1098. Time spent on efforts to obtain a fee in those cases benefited the attorneys exclusively

and did not increase, protect, or preserve the fund. Under the equitable fund theory, the attorneys were not, therefore, entitled to fees for those efforts. 560 F.2d at 1102; *Lindy Brothers Builders, Inc.* v. *American Radiators*, 540 F.2d at 111. Furthermore, since the attorneys' fees award would have been made in those cases from the settlement fund set up for the class members, awarding fees for time spent in obtaining fees would have depleted the settlement fund. However, "[s]tatutorily authorized fees are not paid out of the plaintiffs' recovery, and the attorney in seeking his fee is not acting in any sense adversely to the plaintiff's interest." *Prandini* v. *National Tea*, 585 F.2d at 53.

Although the rationale which supports the decision to award fees for this time in civil rights cases is not as compelling in antitrust cases, the considerations remain persuasive. It may be less difficult to procure representation in most antitrust cases than it is in civil rights cases, but the provision for attorneys' fees in the Clayton Act reflects a congressional intent to provide the same encouragement to bring suits under the antitrust laws as under the civil rights acts. That similarity supports similar interpretations of the respective attorneys' fees statutes. Furthermore, although the treble damages provision might offset some of the harm caused by allowing these hours to go uncompensated, the deterrent effect of treble damages is diluted if that remedy is used to justify a restricted interpretation of the attorneys' fee provision. A multiplier, *see* discussion, *supra*, however, will not be applied to these hours.

D. Interest on Attorneys' Fees and Costs

The plaintiff has requested interest on attorneys' fees and costs awarded to it. In *Capra, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978), the court held that interest is not payable on attorneys' fees in antitrust cases because the Clayton Act makes attorneys' fees part of the court costs and interest is not payable on court costs, and because the treble damage award makes interest on attorneys' fees less necessary than in cases where treble damages are not awarded.

567 F.2d 1322. *Cf., Gates* v. *Collier*, 616 F.2d 1268 (5th Cir. 1980) (interest payable on attorneys' fees in civil rights cases). Other courts, however, albeit without discussion, have allowed payment of interest on costs and attorneys' fees in antitrust cases, *Mt. Hood Stages, Inc.* v. *The Greyhound Corp.*, 616 F.2d 394, 406 n.10 (9th Cir. 1980); *City of Detroit* v. *Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1979); *Perkins* v. *Standard Oil Co. of California*, 487 F.2d 672 (9th Cir. 1973). Furthermore, unlike the Fifth Circuit, the Seventh Circuit apparently does allow interest on costs. *See Harris* v. *Chicago Great Western Ry.*, 197 F.2d 829, 836 (7th Cir. 1952). Therefore, even if attorneys' fees are considered part of the costs rather than part of the judgment, interest on fees is appropriate. Although the tripling of the damage award may make interest on fees less necessary, the punitive nature of treble damages is undermined when these damages are considered part compensation for delay in payment of attorneys' fees. The defendants must pay interest on the awared of fees and costs from the date it is entered.

E. Conclusion

$1,337,402.25	(request for attorneys' time)
− 19,521.25	(noncompensable time; *see* appendix I)
1,317,881.00	
− 131,788.10	(10% reduction for duplication)
1,186,092.90	
− 143,212.48	(fees for time spent on damages; not
1,042,880.42	subject to multiplier; *see* appendix II)
x 1.2	(multiplier)
1,251,456.50	
+ 143,212.48	(fees for time spent on damages)
1,394,668.98	
+ 55,473.75	(fees for law students)
1,450,142.73	
+ 240,270.30	(fees for legal assistants; *see* appendix
1,690,413.03	III)
+ 31,762.50	(all fees for time spent on petition for
1,722,175.53	attorneys' fees and bill of costs)

II. Bill of Costs

A. Court Reporter—Depositions

Costs may be taxed under section 1920 for "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). If a deposition appeared to be reasonably necessary "in light of the particular situation existing at the time it was taken," *Dorothy K. Winston & Co.* v. *Town Heights Development, Inc.*, 68 F.R.D. 431, 434 (D.D.C. 1975), the cost of a deposition may be taxed even if the witness was not called at trial or the deposition used at trial and even if the deposition was a discovery deposition only. *SCA Services, Inc.* v. *Lucky Stores*, 599 F.2d 178, 180 (7th Cir. 1979); *Fey* v. *Walston & Co.*, 493 F.2d 1036, 1056 (7th Cir. 1974). The cost of a deposition is not taxable, however, if the deposition was not within the proper bounds of discovery or was unduly prolonged. *Federal Savings and Loan Insurance Corp.* v. *Szarabajka*, 330 F.Supp. 1202, 1210 (N.D.Ill. 11971). The losing party's objections to the taxation of depositions or parts of deposition must be specific. *Id.*

Since the plaintiff's original bill of costs and invoices in this case did not contain enough information to evaluate whether all of the eighty-six depositions transcribed for the plaintiff were reasonably necessary, pursuant to our order at the status hearing in October, the plaintiff supplemented its bill of costs with a list of the deposition witnesses, the employment of each witness for the years involved in the lawsuit, a description of the subjects covered in each deposition, and the cost of each deposition. The total amount of the request for deposition transcripts was $62,105.78. The defendants objected to the requests for the entire cost of ten depositions and to the requests for part of the cost of eight depositions. The total amount objected to is $14,403.24. A total of $47,702.54 for the cost of deposition transcripts is not objected to by the defendants.

Seven of the ten depositions which the defendants now argue should not have been taken at all were depositions of people listed by the defendants as potential trial witnesses in the Final Pretrial Order, although none were called at the trial. The plaintiff acted reasonably in taking the depositions of anyone identified by the defendants as trial witnesses and in having those depositions transcribed. Moreover, even if those depositions were taken before the Final Pretrial Order was prepared, the defendants' subsequent inclusion of those names in that order indicates that, contrary to the defendants' present argument, the information those people had on the subject matter of this suit was not so irrelevant or so unimportant that their depositions were outside the bounds of discovery. The costs of the depositions of Barber, Pia, Jordanoff, Stroomer, Curto, Wasz and McLean, therefore, will be awarded. The total cost for those seven depositions was $5,588.42.

The defendants object to the request for the cost of Louis A. Ruble's deposition. According to the defendants, Ruble's deposition was taken immediately prior to his testimony at the trial, and the transcript of the deposition was not available for use at the trial. The $113.00 requested for Ruble's deposition, therefore is disallowed.

The defendants argue that only twenty percent of the cost of Theodore K. Eckhardt's deposition should be taxed. Eckhardt was the manager of defendant Yoder's Chicago sales office during the events which gave rise to this lawsuit. He testified twice at the trial. The defendants claim that thirty percent of the cost of his deposition should be disallowed because it was spent on "extraneous" matters "such as the early negotiations between Grohne [the plaintiff's president] and Yoder, technical aspects of the Yoder mill, and the production capacities of other tube mill manufacturers." Copperweld's Supplemental Memorandum in Opposition to Independence's Request for Reimbursement of Certain Costs, p. 8. That type of background information, however, was an appropriate subject for a deposition in this case and is not

outside the bounds of discovery. The defendants also argue that fifty percent of the cost of Eckhardt's deposition should be disallowed because, although the subject matter was discoverable, "Eckhardt's examination was unnecessarily prolonged and repetitive. Eckhardt's deposition is some three hundred pages longer than William Waters' deposition and nearly twice as long as Douglas Yoder's deposition. As the court may recall, Waters and Yoder were far more important as witnesses in this case than Mr. Eckhardt." *Id.* That comparison is meaningless, however, and does not prove that Eckhardt's deposition was unduly prolonged. There are many explanations for the length of Eckhardt's deposition: it covered more subjects than either Waters' or Yoder's; the subjects were covered with appropriate though detailed and extensive examination; and there were numerous objections of defense counsel. Since the defendants concede that the subject matter covered was within the bounds of discovery and have not shown that the deposition was unnecessarily long, the total amount for Eckhardt's deposition will be awarded.

The defendants' remaining objections are made on two grounds. First, the defendants object to requests for the cost of any part of a deposition which did not relate to any issue presented at trial. Specifically, the defendants argue that the plaintiff cannot recover costs attributable to questions regarding functional discounts since we held at trial that evidence of functional discounts was irrelevant, or costs attributable to questions relating to the plaintiff's monopolization claim since that count of the complaint was dismissed before the trial began. The defendants' objection, however, is not sufficient. The standard for awarding the cost of depositions is not whether the deposition was related to an issue presented at trial but whether it was related to an issue which was present in the case at the time the deposition was taken. These depositions were taken before the monopoly claim was dismissed and before our trial ruling on the issue of functional discounts, i.e., when those issues were still part of the case. Depositions or portions of depositions which

relate to those issues, therefore, were "reasonably necessary," and those costs are proper under section 1920(2).

The defendants' second objection is to the request for the cost of depositions or parts of depositions where the witnesses could not answer the particular questions asked, or the witnesses' answers were not helpful to the plaintiff, or the witnesses were not called at trial. That is an adequate objection, however, only if the plaintiff should have known before taking the deposition or asking the questions that the witnesses would not have any useful information. All of the witnesses deposed by the plaintiff were employed in positions in companies which were involved in the subject matter of this suit. It was not unreasonable, therefore, for the plaintiff to think that they might have some knowledge relevant to the suit and to depose them.

Insofar as the defendants' objection relates to only parts of a deposition, they are apparently arguing that upon discovering that the witness did not know anything about a particular topic, it was unreasonable for the plaintiff to have those portions of the deposition covering that topic transcribed. That argument, however, imposes upon the court reporter and the plaintiff the impossible task of deciding and designating which portions of the deposition should be transcribed and which should not be. Since most portions of the deposition, by the defendants' admission, should have been transcribed, it was not unreasonable for the plaintiff to have the entire deposition transcribed without distinction between the useful and useless portions.

The defendants object to the entire cost of the transcript of Clay on the ground that he did not have any relevant knowledge. If the deposition was useless, the plaintiff should not have had it transcribed, and we will disallow the entire cost of Clay's deposition. ($64.00)

The plaintiff will be awarded $61,928.78 for the cost of deposition transcripts.

B. Court Reporter—Court Proceedings

The plaintiff requested $3,750.00 for 7,500 pages of trial proceedings which were transcribed at the regular transcription rate. That amount will be taxed: even if the transcript was not reasonably necessary for use during the trial itself, the transcript was essential for use by the plaintiff in responding to the defendants' post-trial motions.

The plaintiff also requested $5,626.80 for 3,216 pages of trial transcript billed at the higher rate for expedited daily copy. When deciding whether to tax the additional cost of daily transcripts, courts consider several factors: the length of the trial and the complexity of the issues, *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F.Supp. 143, 163 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970); *Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 50 F.R.D. 5 (E.D.Mich. 1970); *cf. Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 234 (1964) (cost of daily transcript disallowed based on district court's personal knowledge that this was not a complicated or extended trial where lawyers were requested to submit briefs and proposed findings); "whether a daily transcript was necessary to minimize disagreement over the testimony of witnesses, and whether proposed findings of fact were required," *Advance Business Systems*, 287 F.Supp. at 163; whether the case "involved expert witnesses whose cross-examination required knowledge of the exact wording of their previous testimony or that of any other witness," *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *Lee National Corp.*, 62 F.R.D. 194, 196 (S.D.N.Y. 1974); the size of the claim, and the importance of witness credibility. *Galella* v. *Onassis*, 487 F.2d 986, 999 n.22 (2d Cir. 1973).

At the hearing in October, the defendants agreed to pay the expedited rate for half of the pages which the plaintiff received at that rate (1608 x 1.75 = $2,814.00). The plaintiff agreed to an award of the other half at the regular rate (1608 x .50 = $804.00).

Finally, the plaintiff requested $500.35 for transcripts of pretrial proceedings. In determining whether the cost of transcripts of pretrial hearings should be taxed,

> the Court must consider both the length and complexity of the whole case and what transpired at the hearings for which [plaintiff] seeks the costs of transcripts. If the proceedings were devoted to limiting and clarifying the issues which were to be heard at a lengthy trial and if such proceedings were of a magnitude that a transcript was needed to determine how the trial would proceed, then a transcript would of course be justified. However if these pretrial hearings did not greatly clarify the trial issues and if their substance could have been determined from the Court's orders and memoranda, then the plaintiff is not entitled to the costs of transcripts of them.

Sperry Rand Corp. v. *A-T-O, Inc.*, 58 F.R.D. 132, 138 (E.D.Va. 1973). *See also Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963). In view of the length, complexity, and importance of the pretrial proceedings in this case, the $500.35 requested is reasonable and will be taxed against the defendants.

The plaintiff, therefore, is awarded $4,554.00 for trial transcripts at the daily rate; $2,814.00 for trial transcripts at the expedited rate; and $500.35 for the transcripts of pretrial hearings. The total award for the cost of the transcripts of court proceedings is $7,868.35.

C. Expert Witness Fees and Expenses

Section 1920 specifically provides that "[f]ees and disbursements for ... witnesses" may be taxed. The defendants argue, however, that fees for expert witnesses should not be taxed in this case because expert witnesses were not reasonably necessary to the plaintiff's case. Two of the plaintiff's experts testified about the damages caused to the plaintiff by the defendants' exclusion of plaintiff from the structural

steel tubing market; one expert testified about the capabilities of the Yoder mill by examining the blueprints and specifications. All of this testimony was necessary to enable the plaintiff to prove its case on damages, *i.e.*, to prove what the plaintiff would have been able to earn if the defendants had not acted tortiously, the Yoder mill had been delivered and the plaintiff had been able to enter the market. Most of the information and analysis given by the experts was not within the limits of common sense or experience, so a jury, comprised of nonexperts, could not have intelligently addressed the issues without expert opinion as a basis for its consideration. Presumably, the defendants would have objected if the plaintiff had solicited this type of opinion from nonexpert witnesses. The plaintiff would have been foolhardy to present a complex case such as this to the jury without any expert opinion, particularly since the defendants called four experts. Expert witnesses, therefore, were essential in the plaintiff's case, and fees and expenses may be awarded as costs.

The defendants also argue that the fees for the plaintiff's expert Albert Madansky should not be taxed because the jury "completely repudiated his overblown damages theories." Although the jury award was less than the amount suggested by Madansky, his testimony was not necessarily useless to the jury. Since the Court was not the trier of fact, we do not know that Madansky was not helpful even if the jury disagreed with him in part. Defendants' argument, therefore, does not justify disallowing an award of fees for Madansky.

The plaintiff also requests reimbursement for the fees paid to the defendants' experts for the time the plaintiff spent deposing them and for their travel expenses. These experts were called by the defendants at trial, and the plaintiff's counsel used the depositions before and at trial to prepare for cross examination, to impeach the witnesses, and to refresh recollection. The defendants suggest, however, that the depositions of the defense experts were unnecessary since the

plaintiff should have discovered the experts' opinions by using interrogatories. That argument exaggerates the usefulness of the latter device, which is designed to identify discreet information or sources of information not to elicit opinions on complex issues where the detailed cross examination allowed by deposition is imperative. Since the plaintiff's depositions of the defendants' experts were necessary for use in the case, the appropriate costs should be taxed against the defendants.

However, although the plaintiff can recover fees and expenses for expert witnesses in this case, it "may recover as costs of suit for expert witnesses only the amounts specified in 28 U.S.C. § 1821." *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d 855, 865-66, and n.12 (7th Cir. 1981). *See also Henkel* v. *Chicago St. Paul M & O Ry.*, 284 U.S. 444 (1932); *Fey* v. *Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974).[5] Under section 1821, a witness can be paid $30.00 per day for each day's attendance at deposition or trial, or time spent going to and returning from the deposition or trial. 28 U.S.C. § 1821(b). Therefore, the correct measure for taxing fees for expert witnesses is not the amount the expert charged the plaintiff, nor is time spent by an expert consulting with attorneys or preparing to testify taxable. Furthermore, under section 1821, the taxable expenses of a witness are actual travel expenses if travel is by common carrier at the most economical rate reasonably available, 28 U.S.C. § 1821(c)(1) or the mileage allowance prescribed for federal government employees if travel is by privately-owned vehicle, 28 U.S.C. § 1821(c)(2); charges for taxis and other

[5] The court in *Sangamo* stated that fees and expenses above the statutory limits can be awarded in "exceptional circumstances." 657 F.2d at 865 n.14. The court, however, did not define the exceptional circumstances which might justify such an award nor has the plaintiff identified any present in this case. Since there is nothing that distinguishes this case from other antitrust cases in which expert witnesses are called, we will not award costs above the statutory limits.

miscellaneous expenses, 28 U.S.C. § 1821(c)(3); and a subsistence allowance when an overnight stay is required, not to exceed the maximum per diem for federal government employees. 28 U.S.C. § 1821(d). The amount taxable is the amount actually paid or the statutorily-defined amount, whichever is less.

After we held at the hearing in October that we would apply the standards of *State of Illinois* v. *Sangamo Construction* in this case, the plaintiff altered its request for expert witness fees and travel expenses to comply with that decision. The plaintiff reduced its request to $1,142.00 from $42,676.59. The defendants' only objection to the lower figure is that it includes a fee for two days in which an expert attended the trial and consulted with the plaintiff's counsel but did not testify. Those costs are not recoverable, 657 F.2d at 867 n.15, and the plaintiff's request will be reduced by $60.00. The plaintiff, therefore, will be awarded $1,082.00 for expert witness fees and expenses.

D. Witness and Travel Expenses

In its supplement to the bill of costs, the plaintiff reduced its request for costs for witness fees and travel expenses to $2,832.66 from $4,787.20. That request includes $1,313.00 for fees and expenses of several trial witnesses who were outside the subpoena power of this Court. At the hearing in October, we held, over the defendants' objection, that the plaintiff could be reimbursed for those fees and expenses, within the statutory limitations. Such an award is within the discretion of the trial court, *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 232 (1964), and depends upon the relevancy and materiality of the witnesses' testimony and, for trial witnesses, the importance of presenting live testimony rather than reading depositions at the trial. *See Marcoin, Inc.* v. *Edwin K. Williams & Co.*, 88 F.R.D. 588, 591 (E.D.Va. 1980); *Dorothy K. Winston & Co.* v. *Town Heights Development, Inc.*, 68 F.R.D. 431, 433 (D.D.C. 1975). We found that the testimony of Foster, Deichmann, and Ayers was important to the

presentation of this case and that, in this trial as in most trials, the live testimony was far preferable.

Although, to reflect the statutory limitations on an award for such expenses, the plaintiff reduced its request for costs of witnesses beyond our subpoena power, the defendants object to part of the reduced request. According to the defendants, the request includes charges for the federal per diem rate even though the plaintiff did not pay expenses equal to or exceeding that amount but paid $57.38 less than the federal per diem rate. Under those circumstances, the plaintiff's request will be further reduced by $57.38.

The plaintiff's supplemental request for witness fees and expenses includes $1,484.36 for twelve witnesses who were deposed but were not called at trial and for two witnesses who were subpoenaed by the plaintiff to appear at the trial but who were not called by the plaintiff.[6] Since those depositions were reasonably necessary, *see* discussion on costs for transcripts of depositions, *supra*, and since the amounts requested are within the statutory limitations for witness fees and expenses, the amounts requested for witness fees and expenses for witnesses deposed but not called at trial are taxable.

If a witness is subpoenaed to appear at trial in good faith, the costs may be taxed even if the witness does not actually testify. *Christian* v. *Tackett*, 86 F.R.D. 220, 222 (N.D.Miss. 1979). In this case, the witnesses were subpoenaed by the plaintiff to testify in the plaintiff's defense of the defendants' counterclaim. The plaintiff could not have known which witnesses would be necessary for that defense until the defendants as counterplaintiffs presented their case. *See id. See also Dasher* v. *Mutual Life Insurance Co. of New York*, 78 F.R.D. 142, 144 (S.D.Ga. 1978). Since the testimony of these two witnesses may have been necessary had the

[6] At the hearing in October, the plaintiff agreed to exclude from its amended request the fees and costs of one witness subpoenaed but not actually called.

defendants' presentation of the counterclaim progressed differently,[7] the plaintiff subpoenaed them in good faith, and costs within the statutory limitation are taxable.

The defendants objected to the plaintiff's original request for $1,521.00 paid by the plaintiff to Welded Tube Co. According to the plaintiff, Welded Tube insisted that the plaintiff pay the cost of locating the copying documents requested by a subpoena, and the plaintiff paid the amount rather than litigate the issue. We held at the hearing in October that the plaintiff could recover the costs of copying the documents and the witness fee and travel expenses but not the finding fee. In its supplement to the bill of costs, the plaintiff states that the witness fee was $21.00 and the copying charges for the Welded Tube materials were $14.30 (143 pages at $.10 a page). The plaintiff, therefore, can be reimbursed for $35.30, paid to Welded Tube.

The plaintiff is entitled to an award of $2,775.28 for witness fees and expenses.

E. Photocopying, Charts, Photographs

Section 1920 allows the court to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). Photocopying charges attributable to discovery and the court's copies of pleadings, motions and memoranda are "reasonably necessary for use in the case" and can be awarded. Extra copies of filed papers and correspondence, and copies of cases, however, are not necessary but are for the convenience of the attorneys and therefore not taxable.

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[7] The plaintiff subpoenaed one witness to testify about the confidentiality of documents which the defendants alleged were unlawfully taken by Grohne. This testimony became unnecessary when we excluded the documents at trial. The plaintiff decided that the second witness' testimony, which would have been about employees who left Regal during the time the defendants alleged that Grohne was inducing them to join the plaintiff, was unnecessary after the defendants presented their evidence.

The proper test for taxing the cost of charts, photographs and similar items is not whether they were used at trial, but whether they were necessary to an understanding of an issue and a material aide to the jury; costs of demonstrative materials which were merely illustrative of expert testimony, other adequate evidence, or argumentative matter are not taxable. *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F.Supp. 143, 164 n.9 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied* 397 U.S. 920 (1970) (The cost of materials to accompany testimony is taxable "only if their preparation was 'necessary in order to have the court understand what may otherwise have been on the record, but what would have been incomprehensible to the inexpert mind.' "); *Esler* v. *Safeway Stores, Inc.*, 77 F.R.D. 479, 483 (W.D.Mo. 1978); *Mikel* v. *Keer*, 64 F.R.D. 93, 95 (E.D. Okla. 1973), *aff'd*, 499 F.2d 1178 (10th Cir. 1974); *Bowland* v. *Kitchens*, 63 F.R.D. 385, 388 (N.D.Miss. 1974); *Hill* v. *Gonzalez*, 53 F.R.D. 1 (D.Minn. 1971); *Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 50 F.R.D. 5 (E.D.Mich. 1970); 6 Moore's Federal Practice, ¶ 54.77[6]. At the hearing in October, after we described the standards we would apply in taxing the costs for photocopying, charts, and photographs, the parties agreed that the defendants would reimburse the plaintiff for one-half of those costs ($13,458.43).

F. Computerized Legal Research

Although the cost of computerized legal research is not on the list of taxable costs in section 1920, "a district court retains limited discretion under Rule 54(d) to award as costs of suit expenses not specifically allowed by statute . . . ." *State of Illinois* v. *Sangamo Construction Co.*, 657 F.2d at 864 n.11. The use of computer aides in research is "reasonable, if not essential, in contemporary legal practice," *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 285 (3d Cir. 1980), and "replaces by instantaneous and supposedly infallible retrieval, many hours which would be billable if performed by human talent." *Pitchford Scientific Instruments Corp.* v. *Pepi, Inc.*, 440 F.Supp. 1175, 1178 (W.D.Pa. 1977) *aff'd*, 582 F.2d 1275 (3d

Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Even without a specific showing of cost effectiveness in this case, therefore, an award of such costs is appropriate, and, based on the list of the subjects researched, which is contained in the plaintiff's supplement to its bill of costs, $5,093.33 is a reasonable amount.

G. *Docket Fees*

The plaintiff is entitled to be awarded docket fees of $291.00.

H. Conclusion

For the reasons stated above, the Plaintiff is awarded the following costs:

(1)	Court Reporter—depositions	$61,928.78
(2)	Court Reporter—court proceedings	7,868.35
(3)	Experts Witness Fees and Expenses	1,082.00
(4)	Witness Fees and Travel Expenses	2,775.28
(5)	Photocopying, Charts, Photographs	13,458.43
(6)	Computerized Legal Research	5,093.33
(7)	Docket Fees	291.00
		$92,497.17

CONCLUSION

For the reasons stated above, the plaintiff is awarded attorneys' fees of $1,722,175.53 plus interest from the date hereof; the order of June 22, 1981 is vacated; and costs of $92,497.17 plus interest from the date hereof are taxed against the defendants.[1]

HUBERT L. WILL
United States District Judge

DATED: June 21, 1982

[1] This Revised Memorandum Opinion replaces the Memorandum Opinion on the subject of fees and costs previously filed on January 19, 1982.

Appendix I—Noncompensable attorney hours

A. Jury instructions on the contract claim			
Associate hours	60.50 x $45.00 =		$ 2,722.50
B. Yoder settlement			
Associate hours	60.50 x $70.00 =	4,235.00	
Partner hours	11.25 x 110.00 =	1,237.50	
			$ 5,472.50
C. Ryerson issue			
Associate hours	7.00 x $55.00 =	385.00	
	43.25 x $60.00 =	2,595.00	
	28.50 x $70.00 =	1,995.00	
Partner hours	3.00 x 100.00 =	300.00	
			$ 5,275.00
D. Deere issue			
Associate hours	6.75 x $50.00 =	337.50	
	19.50 x $60.00 =	1,170.00	
	32.00 x $70.00 =	2,240.00	
	16.00 x $75.00 =	1,200.00	
	4.00 x $80.00 =	320.00	
			$ 5,267.50
E. Unfiled motion and appearance in other case			
Associate hours	6.25 x $55.00 =	343.75	
	5.50 x $80.00 =	440.00	
			$ 783.75
			$ 19,521.25

Appendix II—Time spent on damages

Associate hours	1399.25 x $ 66.84 =	$ 93,525.87
Partner hours	36.75 x $117.65 =	$ 4,323.64
Other*	602.75 x $ 75.26 =	$ 45,362.97
		$143,212.48

* For time spent on damages for which we could not determine the applicable hourly rate, we used the average rate for the plaintiff's attorneys of $75.26.

Appendix III—Noncompensable legal assistant hours

Amount requested			$243,564.05
Ryerson issue			
	48.50 x $30.00 =	$1,455.00	
	2.25 x $35.00 =	78.75	
Deere issue			
	27.75 x $30.00 =	832.50	
	26.50 x $35.00 =	927.50	
			- 3,293.75
			$240,270.30

APPENDIX D

APPENDIX D

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201

Pursuant to memorandum opinion and order entered this day, the motion of plaintiff to amend the award of interest on attorney's fees and costs is granted. Interest on the award, as amended by the order of June 21, 1982, shall be computed as of the date of the original order of the court, January 19, 1982.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INDEPENDENCE TUBE CORPORATION, an Illinois corporation, *Plaintiff,* vs. **COPPERWELD CORPORATION,** a Pennsylvania corporation, and **REGAL TUBE COMPANY,** a Pennsylvania corporation, *Defendants.*	No. 76 C 4201

MEMORANDUM OPINION AND ORDER

On January 19, 1982, Judge Will issued a memorandum opinion in this action in which he awarded to the plaintiff attorney's fees of $1,503,412.20 and costs of $92,497.17, with interest to be computed from that date. The plaintiff then filed a motion to amend the January 19 order, seeking primarily the correction of a mathematical error in the computation of legal assistant fees. A subsequent opinion was issued on June 21, 1982, in which Judge Will ruled that a decimal point was inadvertently misplaced and that the plaintiff therefore was entitled to an award of legal assistant fees in the amount of $240,000, rather than $24,000. The order provided that interest on the award should run from June 21, 1982.

Now the matter is before the court on a motion to amend the award of interest on attorney's fees and costs, providing interest from January 19, 1982. According to the plaintiff, when a court enters a new judgment merely to correct a mathematical mistake in the original judgment, the subsequent judgment should be entered *nunc pro tunc*. *See United States* v. *Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971). The plaintiff contends, therefore, that the award of

interest on the corrected order of June 21, 1982 should be computed as of the date the original order was entered, January 19, 1982.

The defendants, in opposition to the motion, refer to *Harris* v. *Chicago Great Western Ry. Co.*, 197 F.2d 829 (7th Cir. 1952), as authority for their position that interest on the corrected judgment should run only from the date of the subsequent decision and not from the date of the original order. That decision is not controlling here. We note further, that in *Harris*, the Seventh Circuit permitted interest to run as to costs as of the date of the original judgment. *Id.* at 836.

The court concludes that the equities of the situation warrant an award of interest from the date of the original judgment order issued on January 19, 1982. The plaintiff should not be made to suffer the consequences of another's innocent mistake. *See generally Perkins* v. *Standard Oil Co.*, 487 F.2d 672, 676 (9th Cir. 1973). Accordingly, the plaintiff's motion to amend the award of interest on attorney's fees and costs is granted. Interest on the award, as amended by the June 21, 1982 order, shall be computed as of the date of the original order of the court, January 19, 1982.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: July 16, 1982

APPENDIX E

APPENDIX E

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

December 21, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. _____
Hon. _____

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
Nos. 81-2009 and 81-2148
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
and
DAVID F. GROHNE,
Counterdefendant, Appellee.

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Appellee,
vs.
No. 81-2183
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
and
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76 C 4201, Hubert L. Will, Judge.

ORDER

This matter comes before the court on the filing of "UNOPPOSED MOTION TO ENTER AND CONSOLIDATE JUDGMENT" by defendants-appellants on December 15, 1982. In this motion appellants have informed

the court that they are willing not to contest the fees award currently under review in the appeal docketed in 82-2183 so long as that appeal is consolidated with the judgment entered in the appeals docketed in 81-2009 and 81-2148. The appellants' reason for foregoing review of the fees award at this time is to permit the appeal taken on the merits and the fees award both to be reviewed by the United States Supreme Court certiorari. Appellant has informed the court that appelle has no objection to the entry of judgment and the consolidation with the judgment entered in 81-2009 and 81-2148. Accordingly,

IT IS ORDERED that judgment is hereby entered against appellants in the appeal docketed in 82-2183.

IT IS FURTHER ORDERED that the judgment hereby entered in 82-2183 is hereby consolidated with the judgment already entered in appeal Nos. 81-2009 and 81-2148.

APPENDIX F

APPENDIX F

Opinion by Judge Cummings
JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 1, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PHILIP NICHOLS, JR., Circuit Judge*
Hon. RICHARD D. CUDAHY, Circuit Judge

Nos. 81-2009 and 81-2148
INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
vs.
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201
Hubert L. Will, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs to appellees, in accordance with the opinion of this Court filed this date.

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* Judge Nichols was an Associate Judge of the United States Court of Claims when this case was argued. He was sitting by designation. On October 1, 1982, he became a member of the newly created United States Court of Appeals for the Federal Circuit, with the title of Circuit Judge, by various provisions of Pub. L. No. 97-164.

APPENDIX G

APPENDIX G

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 1, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. PHILIP NICHOLS, JR., Circuit Judge*

INDEPENDENCE TUBE CORPORATION,
Plaintiff-Counterdefendant, Appellee,
vs.
Nos. 81-2009, 81-2148
COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Defendants-Counterplaintiffs, Appellants,
vs.
DAVID F. GROHNE,
Counterdefendant, Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 C 4201
Hubert L. Will, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by appellant Copperweld Corporation, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Philip Nichols of the United States Court of Appeals for the Federal Circuit is sitting by designation.

APPENDIX H

APPENDIX H

PARENT/SUBSIDIARY ANTITRUST DECISIONS
1982

Court of Appeals

1. Burlington Industries, Inc. v. Milliken & Company, 690 F.2d 380 (4th Cir. 1982)
2. White v. Hearst Corp., 669 F.2d 14 (1st Cir. 1982)
3. Murray v. Toyota Motor Distributors, Inc., 664 F.2d 1377 (9th Cir. 1982)
4. Reisner v. General Motors Corp., 671 F.2d 91 (2d Cir. 1982)
5. Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310 (7th Cir. 1982)
6. Industrial Invest. Development Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982)
7. Thomsen v. Western Electric Co., 680 F.2d 1263 (9th Cir. 1982)

District Court

8. Galardo v. AMP Inc., 1982-1 Trade Cas. ¶ 64,468 (N.D. Cal. 1982)
9. Joseph Ciccone & Sons, Inc. v. Eastern Industries, Inc., 537 F. Supp. 623 (E.D. Pa. 1982)
10. Processed Plastic Co. v. Warner Communications Inc., No. 81C 3028 (N.D. Ill. April 20, 1982)

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Court of Appeals

11. William Inglis & Sons Baking Co. v. ITT Continental Baking Co. 668 F.2d 1014 (9th Cir. 1981)
12. Ogilvie v. Fotomat Corp., 641 F.2d 581 (8th Cir. 1981)
13. Owens v. Aetna Life & Casualty Co., 654 F.2d 218 (3d. Cir. 1981)

District Court

14. Reisner v. General Motors Corp., 511 F. Supp. 1167 (S.D.N.Y. 1981)

15. Island Tobacco Co. v. R. J. Reynolds Industries, Inc., 513 F. Supp. 726 (D. Hawaii 1981)
16. Bonjorno v. Kaiser Alum. & Chem. Corp., 518 F. Supp. 102 (E.D. Pa. 1981)
17. Merrit v. Libby, McNeil & Libby, 510 F. Supp. 366 (S.D.N.Y. 1981)
18. Re: TV Signal Company of Aberdeen v. AT&T, 1981-1 Trade Cas. ¶ 63,944 (D.S.D. 1981)
19. Thomsen v. Western Electric Co., 512 F. Supp. 128 (N.D. Cal. 1981)
20. United States v. Cotton Baking Co., 513 F. Supp. 223 (M.D. La. 1981)
21. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100 (E.D. Pa. 1981)

1980

Court of Appeals

22. Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)
23. Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)
24. Schwimmer v. Sony Corp. of America, 637 F.2d 41 (2d Cir. 1980)

District Court

25. In re Folding Carton Antitrust Litigation, 1980-2 Trade Cas. ¶ 63,439 (N.D. Ill. 1980)
26. General Glass Co. v. Globe Glass and Trim Co., 1980-2 Trade Cas. ¶ 63,531 (N.D. Ill. 1980)
27. The Mullen Co. v. Agfa-Gevaert, Inc., No. 79C 2773 (N.D. Ill. July 3, 1980)
28. Montana v. Pacific Hide and Fur Depot., 1980-81 Trade Cas. ¶ 63,709 (D. Mont. 1980)

F.T.C.

29. In the Matter of Herbert R. Gibson, Sr., 95 F.T.C. 553 (1980)

1979

Court of Appeals

30. Harvey v. Fearless Farris Wholesale, Inc., 589 F.2d 451 (9th Cir. 1979)
31. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979)
32. Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979)
33. Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979)
34. Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369 (10th Cir. 1979)
35. Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979)
36. Reno-West Coast Distribution Co. v. Mead Corp., 613 F.2d 722 (9th Cir. 1979)
37. Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962 (5th Cir. 1979)

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38. Rosenberg v. United Parcel Service of America, Inc., 1979-1 Trade Cas. ¶ 62,703 (S.D.N.Y. 1979)
39. Amanini, et al. v. Armstrong Cork Co., 1980-1 Trade Cas. ¶ 63,010 (S.D.N.Y. 1979)
40. Citicorp v. Interbank Card Association, 478 F. Supp. 756 (S.D.N.Y. 1979)
41. Newark v. Delmarva Power & Light Co., 467 F. Supp. 763 (D. Del. 1979)
42. In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases, 478 F. Supp. 785 (N.D. Cal. 1979)
43. Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (S.D.N.Y. 1979)
44. Far Eastern Coconut Co. v. Sun Ripe Coconut Corp., 1979-2 Trade Cas. ¶ 62,878 (E.D.N.Y. 1979)
45. In Re: Fine Paper Antitrust Litigation, 82 F.R.D. 143 (E.D. Pa. 1979)

46. First Stop Bookshop, Inc. v. Matthews Book Co., Inc., 476 F. Supp. 1054 (E.D. Mo. 1979)
47. Howard Fisher v. Coca-Cola Bottling Co., 1979-1 Trade Cas. ¶ 62,514 (C.D. Cal. 1979)
48. Las Vegas Drive-In Theatre, Inc. v. National General Theatres, Inc., 1979-2 Trade Cas. ¶ 62,895 (D. Nev. 1979)
49. Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841 (N.D. Cal. 1979)
50. Speed Auto Sales, Inc. v. American Motors Corp., 477 F. Supp. 1193 (E.D.N.Y. 1979)
51. United Roasters, Inc. v. Colgate-Palmolive Company, 485 F. Supp. 1041 (E.D.N.C. 1979)
52. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 478 F. Supp. 889 (E.D. Pa. 1979)

F.T.C.

53. In the Matter of SKF Industries, Inc. 94 F.T.C. 6 (1979)

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54. Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp., 579 F.2d 20 (3d Cir. 1978)
55. H&B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)

District Court

56. Andrews v. U.S. Industries, Inc., 456 F. Supp. 582 (E.D.N.Y. 1978)
57. Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978)
58. Oahu Gas Service, Inc. v. Pacific Resources, Inc., 460 F. Supp. 1359 (D. Hawaii 1978)
59. Schaben v. Samuel Moore & Co., 462 F. Supp. 1321 (S.D. Iowa 1978)
60. Universal Lite Distributors, Inc. v. Northwest Industries, Inc., 452 F. Supp. 1206 (D. Md. 1978)

1977

Supreme Court

61. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)
62. United States Steel Corp., v. Fortner Enterprises, Inc., 429 U.S. 610 (1977)

Court of Appeals

63. Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90 (3d Cir. 1977)
64. Call Carl, Inc. v. BP Oil Corporation, 554 F.2d 623 (4th Cir. 1977)
65. Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72 (3d Cir. 1977)
66. Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977)

District Court

67. Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341 (S.D.N.Y. 1977)
68. Du Pont Glore Forgan Incorp. v. AT&T, 437 F. Supp. 1104 (S.D.N.Y. 1977)
69. Giant Paper and Film Corp. v. Albemarle Paper Co., 430 F. Supp. 981 (S.D.N.Y. 1977)
70. Industria Siciliana Asfalti, Biutmi, S.p.A. v. Exxon Research & Engineering Co., 1977-1 Trade Cas. ¶ 61,256 (S.D.N.Y. 1977)
71. Las Vegas Sun, Inc. v. Summa Corp., 1977-2 Trade Cas. ¶ 61,556 (D. Nev. 1977)
72. Photovest Corp. v. Fotomat Corp., 1977-1 Trade Cas. ¶ 61,529 (S.D. Ind. 1977)
73. Wolff v. Ford Motor Co., 1977-1 Trade Cas. ¶ 61,409 (S.D.N.Y. 1977)

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74. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976)

75. Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976)
76. FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976)
77. International Railways of Central America v. United Brands Co., 532 F.2d 231 (2d Cir. 1976)
78. Link v. Mercedes-Benz of North America, Inc., 1976-2 Trade Cas. ¶ 61,002 (3d Cir. 1976)
79. Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976)
80. Timberlane Lumber Co. v. Bank of America, N.T.&S.A., 549 F.2d 597 (9th Cir. 1976)
81. Triebwasser & Katz v. AT&T, 535 F.2d 1356 (2d Cir. 1976)

District Court

82. Aaron E. Levine & Co. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976)
83. Baton Rouge Marine Contractors, Inc. v. Cargill, Inc., 1976-2 Trade Cas. ¶ 61,212 (E.D. La. 1976)
84. Bonda's Veevoederfabriek, Provimi, B.V. v. Provimi, Inc., 425 F. Supp. 1034 (E.D. Wis. 1976)
85. Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110 (E.D.N.Y. 1976)
86. Inter City Oil Co. v. Murphy Oil Corp., 1976-1 Trade Cas. ¶ 60,948 (D. Minn. 1976)
87. Snyder v. Howard Johnson's Motor Lodges, Inc., 412 F. Supp. 724 (S.D. Ill. 1976)
88. Joe Westbrook v. Chrysler Corp., 419 F. Supp. 824 (N.D. Ga. 1976)
89. I. S. Joseph Co. v. Mannesmann Pipe & Steel Corp., 408 F. Supp. 1023 (D. Minn. 1976)
90. Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F. Supp. 158 (D. Del. 1976)
91. Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F. Supp. 1009 (C.D. Cal. 1976)
92. Purex Corp. v. Procter & Gamble Co., 419 F. Supp. 931 (C.D. Cal. 1976)

93. REA Express, Inc. v. Alabama Great S.R.R. Co., 427 F. Supp. 1157 (S.D.N.Y. 1976)

94. Nestler v. Exxon Corp., 1976-1 Trade Cas ¶ 60,876 (D.D.C. 1976)

95. Triebwasser & Katz v. AT&T, 1976-1 Trade Cas. ¶ 60,769 (S.D.N.Y. 1976)

96. United States v. AT&T, 427 F. Supp. 57 (D. Colo. 1976)

1975

Court of Appeals

97. Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)

98. Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company, 513 F.2d 102 (2d Cir. 1975)

District Court

99. Call Carl, Inc. v. BP Oil Corp., 403 F. Supp. 568 (D. Md. 1975)

100. Chastain v. AT&T, 401 F. Supp. 151 (D. Colo. 1975)

101. Benoit v. Burlington Industries, Inc., 1976-1 Trade Cas. ¶ 60,686 (S.D.N.Y. 1975)

102. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 921 (N.D. Cal. 1975)

103. International Railways of Central America v. United Brands Co., 405 F. Supp. 884 (S.D.N.Y. 1975)

104. Hemley v. American Honda Motor Co., 1975-2 Trade Cas. ¶ 60,457 (S.D.N.Y. 1975)

105. Cromar Co. v. Nuclear Materials & Equipment Corp., 395 F. Supp. 198 (M.D. Pa. 1975)

106. Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221 (S.D.N.Y. 1975)

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107. Chisholm Bros. Farm Equipment Co. v. International Harvester Company, 498 F.2d 1137 (9th Cir. 1974)
108. Battle v. Liberty National Life Insurance Co., 493 F.2d 39 (5th Cir. 1974)
109. Rea v. Ford Motor Co., 497 F.2d 577 (3d Cir. 1974)

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110. Armen De Fillippo v. Ford Motor Company, 378 F. Supp. 456 (E.D. Pa. 1974)
111. Coleman Motor Co. v. Chrysler Corp., 376 F. Supp. 546 (W.D. Pa. 1974)
112. Varney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974)
113. Benoit v. Burlington Industries, Inc., 1974-2 Trade Cas. ¶ 75,295 (S.D.N.Y. 1974)
114. Heatransfer Corp. v. Volkswagenwerk A.G., 1975-1 Trade Cas. ¶ 60,308 (S.D. Tex. 1974)
115. HEW Corp. v. Tandy Corp., 1974-2 Trade Cas. ¶ 75,190 (D. Mass. 1974)
116. Dobbins v. Kawasaki Motors Corp., 1974-1 Trade Cas. ¶ 75,100 (D. Or. 1974)
117. Moraine Products v. ICI America, Inc. 379 F. Supp. 261 (N.D. Ill. 1974)
118. In re Nissan Motor Corp. Antitrust Litigation, 385 F. Supp. 1253 (Jud. Pan. Multi. Lit. 1974)
119. Pacific Engineering & Production Co. v. Kerr-McGee Corp., 1974 Trade Cas. ¶ 75,054 (D. Utah 1974)
120. In re West Coast Bakery Flour Antitrust Litigation, 383 F. Supp. 842 (Jud. Pan. Multi. Lit. 1974)

1973

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121. Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973)

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122. Rea v. Ford Motor Co., 355 F. Supp. 842 (W.D. Pa. 1972)
123. Honeywell, Inc. v. Sperry Rand Corp., 1974 Trade Cas. ¶ 74,874 (D. Minn. 1973)
124. I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868 (S.D.N.Y. 1973)
125. International Railways of Central America v. United Brands Co., 358 F. Supp. 1363 (S.D.N.Y. 1973)
126. Di Costanzo v. Chrysler Corp., 57 F.R.D. 495 (E.D. Pa. 1972)
127. In re Penn Central Securities Litigation, 367 F. Supp. 1158 (E.D. Pa. 1973)
128. Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973)
129. Suburban Car Rentals, Inc. v. International Telephone and Telegraph Corp., 1973-1 Trade Cas. ¶ 74,552 (S.D.N.Y. 1973)

1972

Court of Appeals

130. Ark Dental Supply v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972)
131. Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir. 1972)

District Court

132. America's Best Cinema Corp. v. Fort Wayne Newspapers, 347 F. Supp. 328 (N.D. Ind. 1972)

1971

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133. United States v. Armour & Co., 402 U.S. 673 (1971)

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134. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971)

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135. Credit Bureau Reports, Inc. v. Retail Credit Co., 358 F. Supp. 780 (S.D. Tex. 1971)

1970

Court of Appeals

136. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970)

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137. Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)

138. Johnson v. Ready Mix Concrete Co., 318 F. Supp. 930 (D. Neb. 1970)

139. Beckman v. Walter Kidde & Co., 316 F. Supp. 1321 (E.D.N.Y. 1970)

1969

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140. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)

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141. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969)

142. Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969)

1968

Supreme Court

143. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)

District Court

144. Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W.D. Pa. 1968)

1967

Court of Appeals

145. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967)

District Court

146. Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915 (D. Hawaii 1967)

147. United States v. Blue Chip Stamp Co., 1967 Trade Cas. ¶ 72,087 (C.D. Cal. 1967)

1966

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148. International Railways of Central America v. United Fruit Co., 254 F. Supp. 233 (S.D.N.Y. 1966)

149. Phi Delta Theta Fraternity v. J. A. Buchroeder & Co., 251 F. Supp. 968 (W.D. Mo. 1966)

150. Reines Distributors, Inc. v. Admiral Corporation, 1966 Trade Cas. ¶ 71,838 (S.D.N.Y 1966)

151. Richardson v. Chrysler Motors Corp., 257 F. Supp. 547 (S.D. Tex. 1966)

1965

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152. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965)

District Court

153. Carolina Scenic Stages, Inc. v. Greyhound Corp., 38 F.R.D. 313 (D.S.C. 1965)

154. Highland Supply Corp. v. Reynolds Metals Co., 238 F. Supp. 561 (E.D. Mo. 1965)

155. Julius M. Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (S.D.N.Y. 1965)

1964

District Court

156. Miami Drive-In Theatre, Inc. v. Paramount Pictures Corporation, 1964 Trade Cas. ¶ 71,247 (S.D.N.Y. 1964)

157. Rayco Mfg. Co. v. Dunn, 234 F. Supp. 593 (N.D. Ill. 1964)

F.T.C.

158. In the Matter of Bearings, Inc., 64 F.T.C. 373 (1964)

1963

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159. Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir. 1963)

District Court

160. Aerojet-General Corp. v. Aero-Jet Products Corp., and Plasti-Kote, Inc., 33 F.R.D. 357 (N.D. Ohio 1963)

161. Castlegate, Inc. v. National Tea Co., 34 F.R.D. 221 (D. Colo. 1963)

F.T.C.

162. In the Matter of Luria Brothers and Company, Inc., 62 F.T.C. 243 (1963)

1962

Supreme Court

163. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)

164. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962)

District Court

165. Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd., 210 F. Supp. 930 (D. Utah 1962)

1962

District Court

166. Alpha Distributing Co. v. Jack Daniel's Distillery, Inc., 207 F. Supp. 136 (N.D. Cal. 1961)

1960

Court of Appeals

167. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d 1 (9th Cir. 1960)

District Court

168. United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960)

F.T.C.

169. In the Matter of The Roberts Co., 56 F.T.C. 1569 (1960)

1959

District Court

170. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959)

1958

District Court

171. Honnah B. Streiffer v. Seafarers Sea Chest Corp., 1958 Trade Cas. ¶ 69,074 (E.D. La. 1958)

172. United States v. Standard Oil Company (New Jersey), 1958 Trade Cas. ¶ 69,206 (1958)

1957

District Court

173. Charles Rubenstein, Inc. v. Columbia Pictures Corp., 154 F. Supp. 216 (D. Minn. 1957)

1956

District Court

174. Bertha Bldg. Corp. v. National Theatres Corp., 140 F. Supp. 909 (E.D.N.Y. 1956)

175. Milwaukee Towne Corp. v. Loew's Inc., 139 F. Supp. 809 (N.D. Ill. 1956)

1955

District Court

176. Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 1956 Trade Cas. ¶ 68,277 (S.D.N.Y. 1955)

177. Sanib Corp. v. United Fruit Co., 135 F. Supp. 764 (S.D.N.Y. 1955)

F.T.C.

178. In The Matter of Eastman Kodak Company, 51 F.T.C. 541 (1955)

1954

District Court

179. Avon Pub. Co. v. American News Co., 122 F. Supp. 660 (S.D.N.Y. 1954)

1952

District Court

180. Adolphus M. Burroughs v. Warner Bros. Pictures, Inc., 12 F.D.R. 491 (D. Mass. 1952)

1951

Supreme Court

181. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951)

182. Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)

183. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)

Court of Appeals

184. United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir. 1951)

District Court

185. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951)

1950

Court of Appeals

186. Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F.2d 196 (9th Cir. 1950)

1949

Court of Appeals

187. United States v. New York Great Atl. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949)

1948

Supreme Court

188. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)

189. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)

1947

Supreme Court

190. United States v. Yellow Cab Co., 332 U.S. 218 (1947)

APPENDIX I

APPENDIX I

THE PRESENT STATUS OF THE INTRACORPORATE CONSPIRACY DOCTRINE

MILTON HANDLER* AND THOMAS A. SMART**

One of the most controversial doctrines in modern antitrust law is the concept of intracorporate or intra-enterprise conspiracy which, for purposes of section 1 of the Sherman Act,[1] treats as separate actors members of the same corporate family, either a parent and its subsidiary or affiliated companies which have a commmon parent.[2] It is a doctrine with numerous critics and few friends.[3] The principal criticism is

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[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1976).

[2] Some commentators have confined use of the word "intracorporate" to situations in which officers of a single corporation engage in conduct among themselves in carrying out the business of the corporation, and have reserved the word "intra-enterprise" for dealings between a parent and its subsidiaries or between affiliates. *E.g.*, Barndt, *Two Trees or One?—The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158 (1962). However, because the courts commonly use the phrase "intracorporate conspiracy" interchangeably with "intra-enterprise conspiracy" to describe an alleged conspiracy between a parent and its subsidiary or between affiliated companies, we have done so as well.

[3] *See* Barndt, *supra* note 2; Handler, *Twenty-Five Years of Antitrust*, 73 COLUMN. L. REV. 415 (1973); Handler, *Through the Anti-*

(footnote continued on next page)

that where corporations are commonly owned or controlled and are in fact a single economic unit, they should be treated as such for purposes of section 1.

The problem of how to treat restrictive agreements between parents and subsidiaries or affiliates arises from the language of section 1 of the Sherman Act which forbids contracts, combinations and conspiracies in restraint of trade but does not prohibit restraints of trade as such. Section 2 of the Sherman Act, on the other hand, outlaws single firm behavior—monopolization and attempts to monopolize.[4]

(footnote continued from preceding page)

trust Looking Glass—Twenty-First Annual Antitrust Review, 57 CALIF. L. REV. 182 (1969) [hereinafter cited as *Antitrust Looking Glass*]; Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 YALE L.J. 92 (1966) [hereinafter cited as *Misadventures in Antitrust*]; Handler, *Annual Review of Antitrust Developments*, 10 THE RECORD 332 (1955); Handler, *Contract, Combination or Conspiracy*, 3 A.B.A. ANTITRUST SECTION 38 (1953) [hereinafter cited as *Contract, Combination or Conspiracy*]; Handler, *Anti-trust—New Frontiers and New Perplexities*, 6 THE RECORD 59 (1951); Kempf, *Bathtub Conspiracies: Has* Seagram *Distilled a More Potent Brew?*, 24 BUS. LAW. 173 (1968); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 VA. L. REV. 183 (1955); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 MISS. L.J. 5 (1963); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. REV. 20 (1968); Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 MICH. L. REV. 717 (1977) [hereinafter cited as *Intra-Enterprise Conspiracy*]; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?* 14 DUQ. L. REV. 63 (1975); Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

[4] "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony .

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Thus, section 1, unlike section 2, requires a plurality of actors for its violation; it takes two or more persons to contract, combine or conspire. Under section 1, a single firm might well act with impunity where two firms by agreement could not.[5] Consequently, otherwise lawful behavior may be deemed unlawful if it can be shown that in fact the conduct at issue was engaged in by two or more actors.[6] The fundamental issue is how to define a single actor.

The thesis of this Article is that a definition of a single actor should be determined in accordance with the goals of section 1 of the Sherman Act which is designed to prevent concerted action between distinct economic entities.[7] Surprisingly, most courts, in grappling with the issue of whether related corporations should be treated as seperate entities for purposes of section 1, have failed to consider the goals of antitrust in reaching their decisions. Cases which have held that subsidiaries and affiliates are capable of conspiring have

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. . ." 15 U.S.C. § 2 (1976). Section 2 further prohibits combinations and conspiracies to monopolize.

[5] In *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), the Court held that a manufacturer, acting alone, may unilaterally refuse to deal.

[6] For example, a corporation may lawfully refuse to deal with a customer under the *Colgate* doctrine, based on its own business judgment which the courts will not second guess. *Id.* On the other hand, under certain circumstances, it is unlawful for two or more corporations to agree that one of them will refuse to deal with another. *See, e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Thus, an otherwise lawful refusal by a distributor to deal with its customer could be turned into a violation of § 1 if it can be shown that the distributor acted at the behest of its parent corporation. *See* text accompanying notes 215-20 *infra*.

[7] *See Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). This case is discussed in full at notes 157-67 *infra* & accompanying text.

provided no adequate reason as to why a business enterprise that operates through subsidiaries should be held liable under section 1 when those that operate through divisions are not.[8]

When analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept. A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization.[9] Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition.[10] Moreover, it is significant that in most of the reported cases a holding of intracorporate conspiracy is unnecessary to a finding of liability under section 1. To the extent that an argument can be made that conduct falling somewhere between the nets of sections 1 and 2 should be addressed by the antitrust laws, the intracorporate conspiracy doctrine is ill-suited to the task.[11]

The purpose of this Article is to review the origin of the intracoroprate conspiracy doctrine in the Supreme Court and its subsequent case history, to determine its present status, the role it plays in antitrust litigation, and how that role relates to the policy objectives of the antitrust laws. We analyze the various standards developed to determine a plurality of actors under section 1 and address the question of whether and in what circumstances separately incorpo-

[8] *See* text accompanying notes 101-08 *infra*.

[9] *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 176 (1980).

[10] *See* text accompanying notes 207-34 *infra*.

[11] *See* text accompanying notes 235-40 *infra*.

rated but related corporations should be deemed capable of conspiring. Should a corporation face the spectre of antitrust liability when it decides for tax reasons to organize its distribution arm as a wholly owned subsidiary rather than as a division? Would antitrust policy be served by holding, for example, that a decisionmaker who wears two hats as president of a parent and its wholly owned or controlled subsidiary has conspired in restraint of trade when he sets the prices of the subsidiary's products? At what point does the degree of control or ownership become so attenuated that the policies of the antitrust laws would be served by holding that affiliated corporations are capable of conspiring?

We conclude that where a subsidiary is wholly owned or controlled by its parent or where affiliated corporations are wholly owned or controlled by the same parent, the policies of the antitrust laws would best be served by holding as a matter of law that the corporations are incapable of conspiring.[12] As long as two corporations share common ownership or control, there is no discernbile antitrust policy reason for holding that they are separate economic entities under section 1. The time has come to jettison the aberrant Supreme Court decisions and their progeny of confused and mischievous adjudications.

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[12] By "control" we mean the situation in which a parent, although holding less than 100 percent of the voting stock of a corporation, has sufficient voting control that, if it desires to do so, it could change the corporate form of the subsidiary. *See* text accompanying notes 235-41 *infra*. Unless otherwise noted, throughout this Article we have used the terms "subsidiary" and "affiliate" to mean subsidiaries that are wholly owned or controlled by their parents and affiliates which are wholly owned or controlled by a common parent.

I. The Origin of the "Weird Concept"[13] of Intracorporate Conspiracy

The intracorporate or intra-enterprise conspiracy doctrine has its origin in, and has drawn sustenance from, several Supreme Court decisions.[14] The pertinent opinions share three characteristics that account for the widespread criticism of the doctrine and have prompted efforts to develop alternative formulations of it. First and foremost is their potential reach. The decisions, read broadly, would subject enterprises doing business through subsidiaries to potential liability and criminal penalties under section 1 of the Sherman Act for legitimate discussions and agreements which, if engaged in by two separate, independent corporations, might be challenged as a conspiracy in restraint of trade.[15] Second, the decisions are characterized by a lack of analysis or consideration of the antitrust policy or economic justifications for imposing liability on such a broad basis. Third, it seems fair to say that in all but one case it was unnecessary for imposition of liability to invoke the intracorporate conspiracy doctrine.[16]

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[13] *Contract, Combination or Conspiracy*, *supra* note 3, at 46.

[14] *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

[15] For example, if a parent directs its wholly owned subsidiary to set a particular resale price for an item that the parent manufactures and the subsidiary distributes, the two corporations would be vulnerable to a claim of price-fixing under § 1.

[16] The intracorporate conspiracy doctrine may have been necessary to the result reached in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). *See* notes 30-42 *infra* & accompanying text.

Before turning to the Supreme Court cases, however, it is useful to review briefly *United States* v. *General Motors Corp.*,[17] which constitutes the first judicial acceptance of the notion that there can be a conspiracy between corporate affiliates. In *General Motors*, the Seventh Circuit upheld the conviction of General Motors and three of its wholly owned subsidiaries under section 1 of the Sherman Act for conspiracy to force GM dealers to finance their purchases and their sales of cars from GM's finance subsidiary. Defendants profferred a "single trader" defense,[18] contending that they were affiliated, noncompeting units engaged in a single enterprise and thus could not be held liable for conspiracy under section 1. The court gave this argument short shrift, reasoning simply that defendants could not "enjoy the benefits of separate corporate identity and escape the consequences. . . ."[19] It cited no authority or logic in support of this *ipse dixit*. Moreover, it stated that the "test of illegality under the Sherman Act is not so much the particular form of business organization effected [*sic*], as it is the presence or absence of retraint of trade and commernce,"[20] which is an incorrect statement of the law to the extent that it implies that a unilateral restraint of trade alone can satisfy the requirements of section 1. The court concluded that even if General Motors and its wholly owned subsidiaries were incapable of conspiracy, the defendants would nevertheless be liable on other grounds

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[17] 121 F.2d 376 (7th Cir.) *cert. denied*, 314 U.S. 618 (1941).

[18] Under contemporary antitrust nomenclature, the "single trader" defense refers not to the question of intracorporate conspiracy but to the *Colgate* doctrine. *See* note 6 *supra*. Although used on occasion in the cases and the intracorporate conspiracy literature, we refer to use the phrase "single enterprise" defense to avoid any possible confuction with the *Colgate* doctrine.

[19] 121 F.2d at 404.

[20] *Id.*

because the questioned practice constituted an illegal vertical contractual restraint.[21]

The Supreme Court first considered the question of whether there can be a conspiracy between corporate affiliates in *United States* v. *Yellow Cab Co.*[22] Defendants were Morris Markin, president, general manager and controlling shareholder of Checker Cab Manufacturing Corporation

[21] *Id.* One commentator has summarized the Seventh Circuit's holding as follows: "Form matters. Form does not *really* matter. Even if form did really matter, you're stuck anyhow." McQuade, *supra* note 3, at 191 (emphasis in original).

[22] 332 U.S. 218, 227 (1947). Prior to *Yellow Cab*, the Supreme Court had held affiliated corporations liable for § 1 violations in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944). However, it did so without considering the argument raised in *Yellow Cab* that affiliated corporations constitute a single entity for purposes of § 1. Moreover, defendants in *Crescent Amusement Co.* were clearly liable as well under § 2 of the Sherman Act for conspiracy to monopolize, which requires a finding of specific intent, and thus the § 1 holding was not essential to a finding of liability.

Shortly after deciding *Yellow Cab*, the Court again held that affiliated companies had conspired in violation of § 1 of the Sherman Act in *United States* v. *Griffith*, 334 U.S. 100 (1948), and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. (1948). In *Griffith*, the Court assumed without discussion that the affiliated companies at issue were capable of conspiracy. The finding of a § 1 violation was unnecessary to the result reached because defendants clearly were also liable under § 2 for using their monopoly power in some towns to obtain advantages in buying films over their competitors in other towns where they were not monopolists. 334 U.S. at 106-08. In *Schine Theatres*, however, the Court considered and rejected the argument that affiliated defendants were incapable of conspiring under § 1, citing *Yellow Cab*, 334 U.S. at 116. However, once again, the § holding was unnecessary as defendants were clearly liable for conspiring with nonaffiliates under § 1 and for monopolizing under § 2. *See* Willis & Pitofsky, *supra* note 3, at 43-45.

(CCM) and five affiliated corporations controlled by Markin which operated fifty-three percent of the licensed taxicabs in Chicago, one hundred percent of the licensed cabs in Pittsburgh, fifty-eight percent of those in Minneapolis, and fifteen percent of those in New York City.[23] Several of the corporations grew out of mergers with previously independent competitors. The government alleged that Markin, CCM and the affiliated operating companies had "engaged in a combination and conspiracy to restrain [trade] and to monopolize interstate trade and commerce (1) in the sale of motor vehicles for use as taxicabs . . . in Chicago, Pittsburgh, New York City, and Minneapolis, and (2) in the business of furnishing cab services for hire in Chicago and vicinity."[24] The district court dismissed the complaint for failure to state a claim.

The Supreme Court reversed, holding that the facts alleged supported a charge of conspiracy under section 1. The Court stated:

> The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. *Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.* Similary, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. *The corporate interrelationships of the conspiractors, in other words, are not determina-*

[23] 332 U.S. at 221.

[24] *Id.* at 220.

tive of the appliability of the Sherman Act. That statute is aimed at substance rather than form.[25]

While the italicized language asserts that the fact of affiliation in a parent-subsidiary context will not immunize defendants from section 1 liability where a restraint of trade has occurred, some commentators have argued that other language in the opinion suggests that the Court did not intend to go that far.[26] They point out that the Court emphasized that the complaint charged that the restraint of trade "was the primary object of the combination."[27] In other words, the subsidiaries had not been formed to carry out the business of the parent but rather were corporations of prior disparate ownership that were combined to effect a restraint of trade. The theory of the complaint was that defendants' "'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'"[28] When this language is emphasized, the opinion stands for the proposition that a series of acquisitions, if they result in an unreasonable restraint of trade, may constitute a violation of section 1 and, if monopoly power is achieved, of section 2 as well. This is hardly a startling or disputable propostion and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to

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[25] *Id.* at 227 (citing *Appalachian Coals, Inc.* v. *United States*, 228 U.S. 344, 360-61, 376-77 (1933)) (emphasis added).

[26] *E.g.*, Kempf, *supra* note 3, at 175; Willis & Pitofsky, *supra* note 3, at 39; *Intra-Enterprise Conspiracy*, *supra* note 3, at 719.

[27] 332 U.S. at 227.

[28] *Id.* at 227-28. Each acquisition of necessity involved a contract, and the separate contracts, when aggregated, could be attached as a § 1 violation.

section 1.[29]

[29] It has also been suggested that "the lack of common ownership" undercuts any implication of a broad theory of intra-enterprise conspiracy in *Yellow Cab*. *Intra-Enterprise Conspiracy*, *supra* note 3, at 720. *See also* Kempf, *supra* note 3, at 175. Both commentators contend that evidence that common ownership dipped as low as 18 percent indicates that in fact the combination was among independent competitors. This reasoning, however, ignores the district court's reading of the complaint as one alleging common control. *United States* v. *Yellow Cab Co.*, 69 F.Supp. 170, 172 (N.D. Ill. 1946). Moreover, the Supreme Court in no way intimated that the degree of ownership influenced its decision one way or the other.

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948), has also been cited as supporting the proposition that *Yellow Cab* should be viewed as a § 2, not a § 1, case. Stengel, *supra* note 3, at 12; Willis & Pitofsky, *supra* note 3, at 40. At issue in *Columbia Steel* was the legality of the proposed acquisition of a west coast steel fabricator, Consolidated, by United States Steel through its wholly owned subsidiary, which the government sought to prevent on the ground that the vertical integration would eliminate Consolidated as a purchaser of raw materials. 334 U.S. at 507. The government urged that the vertical acquisition was a per se violation of § 1, relying on *Yellow Cab*. *Id.* at 521.

The Supreme Court rejected that contention, stating that in the *Yellow Cab* complaint "the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities...." *Id.* at 522. Willis and Pitofsky argue that this language indicates that *Yellow Cab* merely holds that "business practices, otherwise lawful, may violate the antitrust laws when undertaken for the purpose of monopolizing." Willis & Pitofsky, *supra* note 3, at 40. *See also* Stengel, *supra* note 3, at 12.

In fact, however, the *Columbia Steel* language on which Willis and Pitofsky rely is not inconsistent with the view that *Yellow Cab* also involved a finding of a § 1 violation. First, in *Columbia Steel* the Court said "combined and conspired," which plainly does not

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In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*,[30] the Supreme Court, however, did not interpret *Yellow Cab* in so narrow a fashion. Instead, without analysis, the Court reiterated the broad language of the opinion in rejecting defendants' contention that they were incapable of conspiring because of their affiliation. At issue in *Kiefer-Stewart* was a joint refusal by two wholly owned subsidiaries of the Seagram corporate family, Seagram and Calvert, to sell to plaintiff, a wholesale liquor dealer, who would not observe the maximum prices imposed by the defendants. The Seventh Circuit held that an agreement among competitors to fix maximum resale prices for their products did not violate the Sherman Act.[31] In reversing the decision, Justice Black first held that a vertical agreement fixing *maximum* prices was per se unlawful[32] and then, citing *Yellow Cab*,

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imply that *Yellow Cab* was a unilateral § 2 monopolization case. Moreover, elsewhere in the opinion, the Court distinguished *Yellow Cab* on the ground that it had been decided on the basis of the pleadings and thus the government's allegation of unreasonable restraint of trade had been accepted as true for purposes of determining whether it had stated a claim. In contrast, in *Columbia Steel* the government had failed to demonstrate that any unreasonable restraint of trade had resulted. 334 U.S. at 524-27. Thus, *Columbia Steel* is consistent with the view that *Yellow Cab* involves a § 1 violation.

What *Columbia Steel* does indicate is that *Yellow Cab* stands for the proposition that a series of vertical acquisitions may well violate § 1 if an unreasonable restraint of trade results from the acquisitions, which, as we noted in the text above, is not the same as saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to § 1.

[30] 340 U.S. 211 (1951).

[31] 182 F.2d 228 (7th cir. 1950), *rev'd*, 340 U.S. 211 (1951).

[32] 340 U.S. at 213 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

rejected defendants' argument "that their status as 'mere instrumentalities of a single manufacturing-merchandising unit' [made] it impossible for them to have conspired in a manner forbidden by the Sherman Act."[33] Justice Black reasoned that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g. United States v. Yellow Cab . . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.*"[34] Nowhere did the Court consider or articulate the policy justification for such a rule or explain why the rule should have special applicability to commonly owned corporations that hold themselves out as competitors.

As in the case of *Yellow Cab*, it has been suggested that the intracorporate conspiracy holding was unnecessary under the facts presented.[35] The argument is that apart from the joint refusal of the two subsidiaries to sell to plaintiff, the evidence clearly established vertical price-fixing by each seller with its own wholesalers.[36] However, this fact alone would not have provided a sufficient basis for finding a section 1 violation. When *Kiefer-Stewart* was before the Court, neither *United States* v. *Parke, Davis & Co.*[37] nor *Albrecht* v. *Herald Co.*[38] had been decided. Thus, there was not yet support for the proposition that plaintiff could allege a combination between himself and Seagram as of the day he unwillingly complied with the resale price agreement,[39] or

[33] *Id.* at 215.

[34] *Id.* (emphasis added).

[35] Willis & Pitofsky, *supra* note 3, at 45.

[36] 340 U.S. at 213.

[37] 362 U.S. (1960).

[38] 390 U.S. 145 (1968).

[39] "Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he

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an unlawful combination among Seagram and its other wholesale customers[40] to require plaintiff to adhere to resale prices. Moreover, there is no evidence in the *Kiefer-Stewart* opinion that plaintiff had in fact ever agreed to the maximum resale prices sought by its supplier, Calvert.[41] Nor is there any evidence of combination among the other wholesalers to cooperate in enforcing the maximum resale prices. In sum, while it has been argued that the intracorporate conspiracy allegation was unnecessary to the result reached in *Kiefer-Stewart*, neither the facts of the case nor the state of the law at the time of the decision supports this view.[42]

Kiefer-Stewart was followed shortly by *Timken Roller Bearing Co.* v. *United States*,[43] where the Court once again repeated without analysis its view that common ownership or control was not conclusive for purposes of section 1. In *Timken*, an American company owning thirty percent of the stock of an English corporation and fifty percent of a French company,

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unwillingly complied with respondent's advertised price." *Id.* at 150 n.6; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 142. *See* note 59 *infra* & accompanying test.

[40] In *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), the Supreme Court held that Parke, Davis & Co. had created a combination to fix prices with its wholesalers and retailers because it had secured its retailers' acquiescence to the suggested prices by threats of termination and because its wholesalers had cooperated in terminating price-cutting retailers. *See also Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. at 141-42.

[41] 340 U.S. at 213.

[42] *See Intra-Enterprise Conspiracy*, *supra* note 3, at 724 n.45. *Kiefer-Stewart*, nevertheless, does not undermine our thesis that it is inappropriate to rely upon the intracorporate conspiracy doctrine when the action complained of does not rise to the level of a § 2 violation. *See* text accompanying note 224 *infra*.

[43] 341 U.S. 593 (1951).

all bearing substantially the same name, was held to have engaged in an illegal cartel with its affiliates. These companies participated in arrangements which, among other things, allocated trade territories among themselves, fixed prices on products sold in the territories assigned to the others, and protected each other's markets.[44] Writing for the majority, Justice Black restated unequivocally his earlier ruling in *Kiefer-Stewart* that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws."[45] The only justification for this result is found in the concurring opinion of Justice Reed, who observed that:

> It may seem strange to have a conspiracy for the division of territory for marketing between one corporation and another in which it has a large or even a major interest, but any other conclusion would open wide the doors for violation of the Sherman Act at home and in foreign fields.[46]

Justice did not, however, cite any examples of how the doors for violation would be opened were the Court to have decided the case differently.

Justice Jackson, in dissent, took the majority to task, viewing its holding as invalidating any arrangement between subsidiary and parent to do that which would be lawful when undertaken by the parent alone. In Justice Jackson's view, this result placed "too much weight on labels."[47] He analyzed the economic reality of the arrangment and its effect on competition, finding that Timken had powerful rivals in foreign markets which prompted it to create "a British subsidiary to go after business best reach-

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[44] *Id.* at 596.

[45] *Id.* at 598.

[46] *Id.* at 601-02 (Reed, J., joined by Vinson, C.J., concurring).

[47] *Id.* at 607 (Jackson, J., dissenting).

able through such a concern and a French one to exploit French markets."[48] Thus, he concluded, "this decision will restrain more trade than it will make free."[49]

As in the case of *Yellow Cab,* the commentators have read *Timken* in a narrow fashion, suggesting that Justices Reed and Jackson's interpretations of the majority opinion are too broad, and noting that the facts of the case support a far narrower holding of liability under section 1.[50] Thus, it has been emphasized that the district court believed that the stock acquisitions by American Timken and Dewar and subsequent incorporation of British Timken were designed to continue a preexisting horizontal agreement between American Timken and British Timken's predecessors that had divided markets, fixed prices, and otherwise restrained competition between the parties.[51] Moreover, in concluding that American Timken was a separate corporate unit from British and French Timken for purposes of section 1, the district court relied on the fact that British Timken and French Timken had "retained their corporate independence and jealously guarded their interests" in dealing with American Timken.[52]Thus, arguably, there was effectively no parent-

[48] *Id.*

[49] *Id.* at 608.

[50] McQuade, *supra* note 3, at 211-12; Stengel, *supra* note 3, at 17; Willis & Pitofsky, *supra* note 3, at 46-48; *Intra-Enterprise Conspiracy, supra* note 3, at 722; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14* DUQ. L. REV. 63, 72-73 (1975).

[51] United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 311 (N.D. Ohio 1949).

[52] *Id. See Intra-Enterprise Conspiracy, supra* note 3, at 722. The author also suggests that the fact that the parties found it necessary to enter into written agreements to govern the competition among themselves indicates a lack of control. *Id.* at 738 n. 118.

subsidiary relationship since American Timken did not in fact control British Timken or French Timken.

The Court did not accept this limited view of its past pronouncements. On the contrary, in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[53] Justice Black once again reiterated his freewheeling conception of the doctrine. The case was a treble damage action brought by several franchised dealers of defendant Midas, Incorporated. Other defendants included Midas' parent, International Parts Comporation, two other subsidiaries of International Parts, and six individuals who were officers or agents of the corporations.[54] The dealers alleged a conspiracy in restraint of trade among all of the defendants, challenging as illegal certain provisions in their franchise agreements that barred them from purchasing from other sources of supply, prevented them from selling outside their designated territory, tied the sale of mufflers to the sale of the other products in the Midas line, and required them to sell at fixed retail prices.[55]

In affirming summary judgment for defendants, the Seventh Circuit held that they were incapable of conspiring as a matter of law because "International Parts and the other defendants composed the *single business entity* by which

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[53] 392 U.S. 134 (1968).

[54] *Id.* at 135. Midas was a wholly owned subsidiary of International Parts. *Id.* at 136. It is not clear from either the Supreme Court or the Seventh Circuit decision the degree of ownership of International Parts in the other two subsidiaries. However, the affidavit submitted by the defendants in support of their summary judgment motion below stated "that all the related companies were part of a family corporate venture wholly owned by a father and son." *Antitrust Looking Glass, supra* note 3, at 184 (footnote omitted).

[55] 392 U.S. at 137.

the . . . [controlling] family sold exhaust parts."[56] Moreover, the court cited with approval the district court's finding that " '[t]here is no evidence . . . that these corporations competed with each other or acted in any manner other than as a single integrated business.' "[57]

Justice Black, for the Supreme Court majority, reversed, confining the entirety of his reasoning to a single sentence, which echoed the Seventh Circuit's analysis a quarter of a century before in *United States* v. *General Motors:* "But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."[58]

The Justice went on to note, however, that each petitioner could have charged "a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements . . . or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination' . . ."[59] Inclusion of these alternative holdings

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[56] 376 F.2d 692, 694 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968) (emphasis added). It is interesting to note that the Seventh Circuit did not rely on *General Motors*, its own decision, but was reversed based on the reasoning in that opinion.

[57] *Id.* at 699.

[58] 392 U.S. at 141-42 (citing *Timken Co.* v. *United States*, 341 U.S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947)). *See* notes 17-21 *supra* and notes 192-206 *infra* & accompanying text for analysis of this standard.

[59] 392 U.S. at 142 (quoting *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *United States* v. *Arnold, Schwinn & Co.* 338 U.S. 365, 372 (1967); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1959)).

strongly suggests that the intracorporate conspiracy holding was unnecessary on the facts presented.

Significantly, the record revealed a dispute between the parties as to whether or not the parent and subsidiary sold competing lines of exhaust systems and held themselves out as competitors.[60] Justice Black's opinion does not address this question. If the parent and the subsidiary in fact sold competing products and held themselves out as competitors, the case might go no further than *Kiefer-Stewart*, where the Court had stressed that fact.[61] If, on the other hand, the parent and subsidiary did not sell competing products and did not hold themselves out as competitors, then the opinion stands for the limitless view that virtually any action which is ordinarily permissible is capable of being construed as an unlawful conspiracy if the company happens to have a parent, a subsidiary or a sister company that can be alleged to have acted in concert with it.[62]

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[60] *Antitrust Looking Glass*, *supra* note 3, at 184-85. The plaintiffs argued but did not substantiate that the defendant corporations competed with each other. 376 F.2d at 699.

[61] 340 U.S. at 215. *See* notes 30-42 *supra* & accompanying text.

[62] It has been suggested that the easy dispatch with which Justice Black dealt with defendants' single enterprise argument in *Perma Life* is difficult to reconcile with the Court's reasoning in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962), a case decided after *Kiefer-Stewart* but before *Perma Life*. *See, e.g., Intra-Enterprise Conspiracy*, *supra* note 3, at 729-30. In *Sunkist Growers*, the Court declined to find a conspiracy among Sunkist and its wholly owned subsidiaries, Exchange Orange and Exchange Lemon, both of which belonged to the Sunkist organization and which claimed exemption from the Sherman Act by reason of the agriculture cooperative exemption contained in § 6 of the Clayton Act and in the Capper-Volstead Act because, *inter alia*, there was "no indication that the use of separate corporations had economic significance in itself or that outsiders considered and

(footnote continued on next page)

One commentator has suggested that *United States* v. *Citizens & Southern National Bank*[63] undermines the reasoning in *Perma Life* and indicates that the Supreme Court might be amenable to the single enterprise defense where the parent controls the everyday activities of its subsidiary.[64] However, *Citizens & Southern* does not reach so far and does not make clear precisely what limits, if any, the Court reads into Justice Black's language in *Perma Life*.

At issue in *Citizens & Southern* was the relationship between defendant Citizens and its system of de facto branch banking which it had established to avoid a Georgia law that prohibited de jure branch banking. Citizens was instrumental in founding several banks, five percent of the shares of

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dealt with the three entities as independent organizations." 370 U.S. at 29.

The Court's concentration on substance and economic significance, rather than on the mere fact of separate incorporation, which it termed of de minimis importance, appears at odds with its approach in the intracorporate conspiracy cases. Moreover, the Court's reference to the fact that outsiders did not deal with the company as other than a single unit suggests that whether a company has held itself out as a competitor is an important factor in determining whether affiliated companies are two economic entities or one. Interestingly, Justice Black joined the majority opinion in the case.

However, in *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), the Third Circuit opined that *Sunkist* "offers scant support for an attack on the intra-enterprise conspiracy doctrine." Because it reasoned that *Sunkist* had in fact held that "the policy behind the Capper-Volstead Act required that two affiliated subsidiaries of a fruit marketing organization be treated as exempt agricultural organizations." *Id.* at 33-34 n.49.

[63] 422 U.S. 86 (1975).

[64] *Intra-Enterprise Conspiracy*, *supra* note 3, at 741.

which it held with the rest placed in the hands of friendly parties. The five percent banks, using Citizens' logo on their buildings, papers, and letterhead, provided a full range of Citizens' services. Moreover, Citizens selected the principal executive officers of the five percent banks, oversaw selection of their directors, and appointed one of its own executives to serve as an "advisory director." Finally, Citizens supplied each five percent bank with a wealth of information on "every conceivable banking procedure and problem,"[65] including data suggesting interest rates and service charges. As a result, "in almost every respect save corporate form, each of the 5-percent banks was a *de facto* branch of [Citizens]."[66]

After Georgia amended its law to permit branch banking, Citizens applied to the Federal Deposit Insurance Corporation for permission to acquire the outstanding shares of the de facto banks to make them de jure branches. The FDIC approved five of six proposed acquisitions, but the Justice Department challenged them as violative of section 7 of the Clayton Act. In addition, the government claimed that the historic de facto branch relations between Citizens and its five percent banks constituted a tacit agreement to fix prices amounting to a per se violation of section 1 of the Sherman Act.[67]

In rejecting the price-fixing claim, the Supreme Court analyzed the evidence establishing an agreement and concluded that the district court had correctly held it insufficient to support a finding that the defendants had in fact conspired to fix prices:

> Were we dealing with independent competitors having no permissible reason for intimate and continuous

[65] 422 U.S. at 93.

[66] *Id.*

[67] *Id.* at 112.

> cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy to affect prices. But, as we indicate below, the correspondent associate programs, as such, were permissible under the Sherman Act. In this unusual light, we cannot hold clearly erroneous the District Court's finding that the lack of significant price competition did not flow from a tacit agreement but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate programs.[68]

This passage has been cited as implying an acceptance by the Supreme Court of a "control theory" for determining when corporations should be treated as a single enterprise under section 1.[69] In fact, however, the Court did not go so far. The language simply states that while the evidence might have been sufficient to uphold a finding of conspiracy to fix prices between truly independent companies, it was insufficient where the companies had legitimate business reasons for meeting and consulting. This is not the same as holding that they are incapable of conspiring for purposes of section 1 because one controls the other. This language does suggest, however, that although commonly owned or controlled corporations can conspire, the courts will require greater evidence of actual contract, combination, or conspiracy than in section 1 cases involving completely independent companies that have no proper reason for meeting or consulting. This would, of course, be a significant holding in the intracorporate conspiracy context. Recently, several courts

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[68] *Id.* at 113-14.

[69] *Intra-Enterprise Conspiracy, supra* note 3, at 741-42.

have adopted this evidentiary approach, but without citing *Citizens & Southern*.[70]

It is also of interest that in *Citizens & Southern* the Supreme Court noted that "[t]his Court has held that even commonly owned firms *must* compete against each other, if they hold themselves out as distinct entities," citing *Yellow Cab, Kiefer-Stewart, Timken*, and *Perma Life*.[71] This may appear to be a slight mistatement of the law. *Kiefer-Stewart* did not hold that commonly owned firms—or independent ones, for that matter—must compete; rather, it held, as the Sherman Act mandates, that they could not conspire not to compete. However, assuming the Court meant to restate the language of *Keifer-Stewart*, this statement arguably means that the Court would narrowly interpret the intracorporate conspiracy doctrine to apply only where commonly owned firms have held themselves out as competitors. But if the Court in *Citizens & Southern* meant to confine the intracorporate conspiracy doc-

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[70] In William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 652 F.2d 917 (9th Cir. 1981), the court stated:

> We express no views about the existence of . . . [an intracorporate] conspiracy in this case. We note, however, that although a conspiracy may be inferred from circumstantial evidence, Inglis must show an understanding between the alleged coconspirators with the specific intent of each to restrain trade or monopolize the market. *With [sic] appropriate regard for this requirement, the typically close relationship between parent and subsidiary could too easily give rise to inferences of conspiratorial activity. Antitrust laws should not deter legitimate consultation between a holding company and its subsidiary with regard to financial planning or the establishment of lawful economic goals to be pursued by the subsidiary.*

Id. at 959 (emphasis added). *See also Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128, 131 (N.D. Cal. 1981); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *Sulmeyer* v. *Seven-Up Co.*, 411 F.Supp. 635, 641 (S.D.N.Y. 1976).

[71] 422 U.S. at 116-17 (emphasis added).

trine to firms that competed, it is curious indeed that it did not reject the section 1 claim on the ground that the de facto branch banks had not held themselves out as competitors. *Citizens & Southern* simply does not clarify what limits, if any, there are to the reach of *Perma Life*.[72]

II. Intracorporate Conspiracy Doctrine in the Circuit Courts of Appeals and District Courts

As the above analysis indicates, the Supreme Court opinions in the intra-enterprise area share common characteristics—broad rulings that could potentially jeopardize normal parent-subsidiary relations, a failure to articulate the policy basis or justifications for such holdings, and facts that would have justified a holding of liability on other grounds (with the exception of *Kiefer-Stewart*). It is thus not surprising that the lower courts have attempted to formulate some alternative rationale or standard for limiting the potential sweep of the Court's decisions. However, the same broad language that impelled some courts to attempt to constrict the doctrine convinced others that there was no choice but to permit claims of intracorporate conspiracy to proceed to trial.

At present, the First, Third, and Fifth Circuits have held as a matter of law that a parent and its wholly owned subsidiary, due to separate incorporation, provide the plurality of actors

[72] In rejecting the government's claim under § 7 of the Clayton Act, the Court noted that there had never been any "real competition" between the de facto branches and Citizens as a result of the de facto branch bank relationship, and therefore the merger would not be likely to substantially lessen competition. *Id.* at 121. Indeed, the result of the de facto branch bank system was "an almost total absence of competition" between Citizens and the five percent banks and among the banks themselves. Robinson, *Recent Antitrust Developments: 1975, 76* COLUM. L. REV. 191, 227 (1976). The Supreme Court upheld the de facto branch banking arrangement under § 1 as reasonable since its "whole purpose and effect [was] to *defeat* [the] restraint of trade" imposed by Georgia's branch banking law. 422 U.S. at 118 (emphasis in original).

required by section 1.[73] In contrast, the Seventh, Eighth, and Ninth Circuits have held that the capacity of separately incorporated but related corporations to conspire cannot be determined solely from the fact of separate incorporation but must be decided after analyzing all the facts and circumstances regarding the corporations' interrelations.[74] While the Second Circuit has not squarely decided the issue, it is at

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[73] *First Circuit:* George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). *But cf. White* v. *Hearst Corp.*, No. 80-891-Z, at 4-5 (D. Mass. Apr. 9, 1981) (where the court held on all the facts and circumstances that defendants were a single enterprise incapable of conspiring under § 1); *Third Circuit: Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Bravman* v. *Bassett Furniture Indus., Inc.*, 552 F.2d 90, 101 n.32 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977); *Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 81 n.16 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Cromar Co.* v. *Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975). *But see Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 f.2d 1093, 1094-95 n.1 (3d Cir. 1972); *Fifth Circuit: H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978); *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *see* notes 77-111 *infra* & accompanying text.

[74] *Seventh Circuit: Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *But see United States* v. *New York Great Atl. & Pac. Tea Co.*, 173 F.2d 79, 87-88 (7th Cir. 1949); *United States* v. *General Motors Corp.*, 121 F.2d 376, 404 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941); *cf. Tamaron Distrib. Corp.* v. *Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) (allegations of conspiracy between manufacturers and noncompeting agent held sufficient to state a § 1 claim); *Eighth Circuit: Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587-90 (8th Cir. 1981); *cf.* TV Signal Co. v. A.T.&T., 462 F.2d 1256, 1260 (8th Cir. 1972) (holding that whether intracorporate conspiracy doctrine should be limited should be decided in light of actual facts and not determined on the pleadings). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323-29 (8th Cir. 1973); *Ninth Circuit: William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917, 958 (9th Cir. 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v.

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least arguable that the court has construed *Kiefer-Stewart* as limiting liability for intracorporate conspiracy to cases where two corporations have held themselves out as competitors.[75] Similarly, although the Fourth Circuit on two occasions has affirmed judgments for defendants which were rendered below on the basis that a parent and its subsidiary were incapable of conspiring, it has done so without expressly considering the intracorporate conspiracy doctrine.[76] The Sixth and Tenth Circuits, and the Court of Appeals for the District of Columbia have not addressed the issue.

In this section, we consider the various approaches that have been adopted for dealing with the intracorporate conspiracy issue and analyze the advantages and disadvantages of each.

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Fearless Farris Wholesale, Inc., 589 F.2d 451, 455-57 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *see* notes 156-89 *infra* & accompanying text; *cf. Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (manufacturer and its distributor, whether a subsidiary or independent, can agree to transfer their business from one wholesaler to another without running afoul of the group boycott per se rule). *But see Dobbins* v. *Kawasaki Motor Corp.*, [1974-1] Trade Cas. ¶ 75,100 (D. Ore.).

[75] *Triebwasser & Katz* v. *A.T.&T.*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976); *International Rys.* v. *United Brands Co.*, 532 F.2d 231, 240 n.19 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). *See Beckman* v. *Walter Kidde & Co.*, 316 F.Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S 922 (1972); text accompanying notes 136-42 *infra*; *cf. Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683, 687 (2d Cir. 1963) (holding that parent's grant of free advertising to subsidiary not sufficient to state a § 1 claim).

[76] *Call Carl, Inc.* v. *BP Oil Corp.*, 554 F.2d 623, 628 n.4 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 189 F.2d 797 (4th Cir. 1951).

A. Perma Life Means What It Says

The First, Third, and Fifth Circuits have embraced the concept of intracorporate conspiracy and have generally refused to permit separately incorporated but related companies to defend on the ground that they are a single enterprise. These courts read the broad language of the Supreme Court's decisions literally and conclude that there is no room to maneuver.

George R Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*[77] is illustrative. Plaintiff, a manufacturer and merchandiser of swimming pool recirculation systems, brought a private antitrust action against a competing manufacturer and merchandiser of such systems, which consisted of three affiliated corporations.[78] Plaintiff alleged that defendants had used improper methods in an attempt to influence architects and engineers to use defendants' proprietary specifications before accepting competitive bids on projects and had engaged in other anticompetitive actions with the object of excluding plaintiff and other competitors, all in violation of sections 1 and 2 of the Sherman Act.[79]

The First Circuit, in affirming judgment for defendants on other grounds, raised sua sponte the issue of whether defendants were capable of conspiring. Although the court noted that the doctrine regarding "thin conspiracies" among affiliated corporations was not free from criticism, it concluded that it was alive and well, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken Roller Bearing*, and *Perma Life*. The court

[77] 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[78] The defendant companies were all owned by one Baker who was a corporate officer and chairman of the board of each, although he was not actively involved in management of two of the three companies. However, the president of one of the three companies served on the board of another and the companies held joint sales meetings. *Id.* at 549 n.1, 557.

[79] *Id.* at 549-50.

stated: "We are satisfied that under the *Yellow Cab* doctrine, the evidence is sufficient to portray a plurality of actors concerting their efforts toward a common end."[80]

Interestingly, the court analyzed the facts regarding the relationships between the defendant corporations not for purposes of determining whether they were one economic unit, but rather for purposes of establishing the existence of joint action by them. It concluded that the companies were not competitors but rather vertically integrated affiliates.[81] The First Circuit deemed significant the mere fact of integration as evidence of conspiracy or agreement under section 1.[82] In contrast, other courts have concluded that the fact of integration establishes that affiliates are a single enterprise incapable of conspiring.[83]

The Third Circuit has similarly concluded that there is no room for separately incorporated affiliates to claim that they are a single enterprise. In *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*,[84] the Third Circuit reversed a district court decision that dismissed plaintiff's antitrust action, holding that plaintiff Cromar had stated a section 1 claim against defendant Atlantic Richfield Company (ARCO) and its wholly owned subsidiary, Nuclear Materials and Equipment Corporation (NUMEC).[85] The suit arose after NUMEC and ARCO terminated an agreement with Cromar for its alleged

[80] *Id.* at 557

[81] *Id.*

[82] *See id.*

[83] See text accompanying notes 156-89 *infra*.

[84] 543 F.2d 501 (3d Cir. 1976).

[85] Plaintiff was a manufacturer of prefinished wood parquet flooring and entered into a contract with NUMEC, guaranteed by ARCO, to convert lumber ito finished wood-plastic fillets. NUMEC would treat the fillets with radiation, and Cromar then would assemble them into parquet panels. ARCO marketed this

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failure to meet the requirements of a contract. The complaint alleged that NUMEC and ARCO had combined and conspired to force plaintiff out of business in violation of sections 1 and 2 of the Sherman Act. The district court granted defendants' motion for a directed verdict on plaintiff's section 1 claim on the ground that plaintiff had failed to introduce evidence of anticompetitive intent necessary to convert a mere breach of contract into an antitrust violation.[86]

The Third Circuit reversed and held that the district court had improperly excluded evidence of defendants' intent. In addition, it expressly rejected defendants' contention that they were legally incapable of conspiring, holding that the Supreme Court decisions in this area are not confined to affiliated corporations that hold themselves out as competitors. The court reasoned that *Perma Life* had dispelled any notion that *Kiefer-Stewart* had imposed any qualification upon the antitrust liability of parents and subsidiaries.[87] The court held that the "absence of any appearance of competition between the defendants [is] irrelevant to their potential Sherman Act liability."[88]

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wood-plastic composite flooring under its own brand name. *Id.* at 502-03.

[86] The district court also granted defendants summary judgment on the § 2 claim on the ground that plaintiff Cromar lacked standing. The Third Circuit reversed and held that Cromar did have standing under § 2. *Id.* at 504-10.

[87] *Id.* at 512.

[88] *Id.* at 511. The Court rejected as dictum Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093 (3d Cir. 1972), upon which the defendants had relied. 543 F.2d at 512 n.18. There, the Third Circuit had stated in a footnote that there was "ample authority" for the proposition that defendant manufacturer and subsidiary were incapable of conspiring as a matter of law because they had never held themselves out as comptetitors. 461 F.2d at 1094-95 n.1.

The Third Circuit, however, might be sympathetic to the contention that where the concerted action relates solely to the internal management of a single firm and does not restrain external competition, there should not be any liability for conspiracy. In *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemcial Corp.*,[89] the court suggested in a footnote that if limitations on the intracorporate conspiracy doctrine are necessary, they should be based on the notion that the agreement at issue restrained no outsider's trade, rather than on the concept that affiliated corporations are incapable of conspiring.[90]

The law in the Fifth Circuit similarly appears to be that *Perma Life* means what it says. In *Battle* v. *Liberty National Life Insurance Co.*,[91] plaintiffs were funeral home companies and their directors who contended that arrangements between defendants Liberty National Life Insurance Company and its wholly owned subsidiary, Brown-Service Funeral Home Company, violated sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act[92] in that the

[89] 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978).

[90] *Id.* at 33-34 n.49. Even were the Third Circuit ultimately to adopt this standard, it is not a completely satisfactory distinction in practice. *See* text accompanying notes 124-34 *infra*.

[91] 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

[92] *Id.* at 42. Defendant Liberty National issued several types of insurance, including burial insurance; Brown-Service contracted with Liberty to provide merchandise and services required by the burial insurance policies. Brown-Service in turn contracted with numerous independent funeral homes and directors in Alabama to perform Brown-Service's obligations under its contract with Liberty National. Those independents who contracted with Brown-Service were known as authorized homes, and the services to be rendered under Liberty National burial insurance policies differed depending on whether the insured used an authorized home or an unauthorized home. *Id.* at 43.

arrangements at issue coerced policyholders into dealing with Brown-Service authorized homes.[93]

The district court granted defendants' motion to dismiss on grounds unrelated to the intracorporate conspiracy doctrine.[94] The Fifth Circuit reversed and, in doing so, rejected the argument raised on appeal that the defendants were, as a matter of law, incapable of conspiring.

> Defendants argue, however, that because Liberty National and Brown-Service are one organization or business unit and not competitors, they are unable to form a combination or conspiracy within the meaning of § 1. We cannot agree.
>
> Even though Liberty National and Brown-Service are not competitors, because Liberty National is in the insurance business while Brown-Service provides funeral services and merchandise, the alleged facts tend to establish that they are operationally two separate organizations entirely capable of combining or conspiring to restrain trade. That the defendants do not compete with each other in no way precludes them from combining or conspiring to suppress competition, the ultimate result of which would inure to their mutual benefit. While the existence of competition between two organizations would tend to establish their separateness and thus fulfill the requirement that it takes more than one party to create a combination or conspiracy, *the absence of such*

[93] *Id.* at 44-45.

[94] The district court held that (a) plaintiffs lacked standing; (b) a prior consent decree between Liberty National and the government immunized defendants' conduct from liability; and (c) the McCarran-Ferguson Act exempted Liberty National from liability under the antitrust laws. *Id.* at 43-44.

competition does not preclude the existence of two separate organizations.[95]

There is a certain ambiguity in the court's concept of "separateness." The court states that evidence that a parent and its affiliate do not compete may indicate that they are "operationally two *separate* organizations."[96] On the other hand, existence of competition between two organizations would tend to establish their "separateness" as well. It is difficult to understand what, if anything, would establish that a parent and its affiliate comprise a single business unit. Is the court saying anything different than the assertion that separate incorporation is enough to establish the plurality of actors required under section 1?

Whatever ambiguity there may have been was clarified in the court's subsequent decision in *H & B Equipment Co.* v. *International Harvester Co.*,[97] where, in affirming a directed verdict for defendants on other grounds in a sections 1 and 2 action brought by a terminated dealer of International Harvester, the court stated: "The parent's choice of form is important. Having availed itself of separate incorporation for Harco, International Harvester marked it off as a distinct entity, and the antitrust laws treat it as such."[98]

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[95] *Id.* at 44 (emphasis added). It is of interest to note that *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert denied*, 408 U.S. 922 (1972), cited by the Fifth Circuit to support its reasoning, in fact reaches the directly opposite conclusion of the Fifth Circuit. The Court in *Beckman* held that because the parent and subsidiary did not compete, they were not capable of conspiring under § 1. *See* text accompanying notes 136-42 *infra*.

[96] 493 F.2d at 44 (emphasis added).

[97] 577 F.2d 239 (5th Cir. 1978).

[98] *Id.* at 245.

The fundamental problem with the literal approach of the First, Third, and Fifth Circuits to the intracorporate conspiracy doctrine is that it reaches too far and renders illegal a host of legitimate parent-subsidiary or corporate affiliate arrangements and agreements. For example, if a parent directed its wholly owned distribution subsidiary to sell the parent's products at a certain price, the parent and subsidiary would be liable for price-fixing. If a parent controlled two subsidiaries which sold the same product, assigned them territories and directed that they not compete against each other, they could be liable for horizontal conspiracy to restrain trade. Similarly, if affiliated companies follow parallel pricing or marketing policies, they conceivably could be sued on a theory of conscious parallel action with plus factors.[99] A manufacturer who orders a wholly owned subsidiary to cut back or shut down its production or to refuse to deal with certain customers could incur treble damage liability. A foreign corporation that operated in the United States through a wholly owned subsidiary would be at risk under the Sherman Act if it dictated its subsidiary's prices or ordered the subsidiary to refuse to deal with a third party. In short, there are numerous everyday actions in which related companies engage that would become potential sources of violation. The intracorporate conspiracy doctrine has been repeatedly criticized on this ground.[100] It is no

[99] *See, e.g.*, *Venzie Corp.* v. *United States Mineral Prods., Co.*, 521 F.2d 1309 (3d Cir. 1975). "Plus factors" refer to the additional elements that must be demonstrated before a factfinder may permissibly infer a conspiracy from evidence of parallel business conduct. These include, *inter alia*, (1) a finding that the business conduct at issue is not in the economic interests of the defendants, and (2) additional evidence of improper motivation in entering the agreement. *Id.* at 1314.

[100] *See Misadventures in Antitrust*, *supra* note 3, at 121-22; *Contract, Combination or Conspiracy*, *supra* note 3, at 47; McQuade, *supra* note 3, at 216; Willis & Pitofsky, *supra* note 3, at 21; *Intra-Enterprise Conspiracy*, *supra* note 3, at 727.

answer to say that the doctrine never contemplated any such chamber of horrors. If so, why the overbreadth and absolute character of its formulation? And if its reach does not embrace these hypothetical situations, at what point is the line drawn?

Form is exalted over substance where the parent that wholly owns or controls the subsidiary could, if it desired, reorganize its subsidiaries into divisions.[101] The courts are uniform that a corporation and its divisions cannot conspire for purposes of section 1 of the Sherman Act.[102] Thus, any threat that the doctrine of intracorporate conspiracy poses can easily be avoided by converting subsidiaries into corporate divisions.[103] Indeed, this is precisely what

[101] While it might be argued that § 1 itself exalts form over substance, we do not believe that this criticism invalidates our point. For further discussion of this issue, see text accompanying notes 235-41 *infra*.

[102] *See, e.g. H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Poller* v. *CBS*, 284 F.2d 599 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962); *J.W.T., Inc.* v. *Joseph E. Seagram & Sons, Inc.*, 347 F. Supp. 965 (N.D. Ill. 1972); *Allen Ready Mix Concrete Co.* v. *John A. Denie's Sons Co.*, [1972] Trade Cas. ¶ 73,955 (W.D. Tenn.); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 323 F. Supp. 1145 (E.D. Pa. 1971), *aff'd per curiam*, 461 F.2d 1093 (3d Cir. 1972); *Kemwel Automotive Corp.* v. *Ford Motor Co.*, [1966] Trade Cas. ¶ 71,882 (S.D.N.Y.); *Deterjet Corp.* v. *United Aircraft Corp.*, 211 F. Supp. 348 (D. Del. 1962); *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103 (W.D. Tex. 1960).

[103] Section 7 of the Clayton Act, 15 U.S.C. § 18 (Supp. IV 1980), expressly provides that nothing contained therein shall

> prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate

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Seagram did after losing before the Supreme Court; it deincorporated its wholly owned subsidiaries and organized them as divisions.[104] Divisions of corporations often operate with as much or more autonomy as corporate subsidiaries. Conversely, a corporate subsidiary may be as much an integral part of a parent as a division.

The principal reason cited by the courts in holding that a corporation is legally incapable of conspiring with its divisions is that such a rule would be unworkable as a matter of business practice. For example, in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*,[105] the Ninth Circuit, in reversing the district court's ruling that divisions of the same corporation were capable of conspiring, reasoned that if such a rule were accepted, it could see "no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not."[106] It noted that no corporation of any size can operate without divisions and that sound management demands extensive delegation of authority within an organization. Moreover, it is inevitable that divisions, even partially autonomous ones, cannot operate completely independently of each other and must

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> lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Since it is lawful under § 7 to form a subsidiary to conduct a corporation's business, it would follow that it is lawful to merge the subsidiary into the corporation as a division.

[104] *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[105] 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[106] *Id.* at 83.

consult and agree on policies.[107] To adopt a rule that a corporation is capable of conspiring with its divisions would in effect hand plaintiffs "on a silver platter, an automatically self-proving conspiracy."[108] This logic applies with equal force in the case of parent-subsidiary relations.

The law is similarly uniform that a corporation cannot conspire with its officers or directors under section 1 because a corporation can act only through its agents.[109] Thus, the court concluded in *Nelson Radio & Supply Co.* v. *Motorola, Inc.*[110] that to allege a conspiracy between a corporation and its officers is in effect to accuse the corporation of conspiring with itself.[111] Similarly, when a parent acts through the officers of its wholly owned subsidiary, it would also appear to be in effect conspiring with itself.

None of the cases that have concluded that *Perma Life* means what it says have (a) articulated any policy reasons for employing the rule; (b) considered whether trade or commerce would in fact be restrained absent the rule; or (c) addressed the fundamental policy implications of this approach.

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[107] *Id.* at 83-84.

[108] *Id.* at 84.

[109] *See, e.g., H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 287 (5th cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646, 654 n.7 (5th Cir. 1977); *Morton Bldgs. of Neb., Inc.* v. *Morton Bldgs., Inc.*, 531 F.2d 910, 917 (8th Cir. 1976); *Walker* v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 617 (3d Cir. 1960); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[110] 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[111] *Id.* at 914.

B. Separate Incorporation as the Beginning, Not the End, of Inquiry

Numerous courts have sought to avoid the limitless impact of the literal approach by devising alternative tests to be applied in determining whether related corporations are distinct economic units. The Seventh, Eighth, and Ninth Circuits, as well as many district courts, have concluded that separately incorporated affiliates may be viewed as a single enterprise in some circumstances. The fact of separate incorporation, to these courts, marks the beginning of the inquiry, not its end. In this section, we examine the various tests that have developed and conclude that although several go a long way toward mitigating the harshness of the doctrine, none is satisfactory.

1. The Sole Decisionmaker Rule

Several courts have held that separate corporations were incapable of conspiring because they were owned and controlled by one person who made decisions as to both.[112] One of the earliest attempts to fashion a more coherent theory of intracorporate conspiracy relied on this approach. In *Windsor Theatre Co.* v. *Walbrook Amusement Co.*,[113] defendants were two separately incorporated movie theatres, which were owned by one Goldberg who also served as chief executive of each. Plaintiff, a rival movie theatre, alleged that defendants had conspired with seven major motion picture distributors (not named as defendants) to refuse to license motion pictures to plaintiff.

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[112] *Las Vegas Drive-In Theatre, Inc.* v. *National Gen. Theatres, Inc.* [1979-2] Trade Cas. ¶ 62,895 (D. Nev.); *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346, 1358-59 (N.D. Cal. 1974), *aff'd in relevant part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

[113] 94 F. Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951).

While the court noted that defendant theatres did not compete with each other, it rested its decision that there could be no conspiracy between the two defendants on other grounds. The court held that there was in fact no conspiracy because the activities of both defendant corporations were directed by Goldberg who was the president and chief executive officer of each.[114] In short, Goldberg was incapable of conspiring with himself.

The court did not say that two affiliated corporate defendants could never conspire with each other. Conceivably, they might be held liable for conspiracy if the concerted action was agreed to by different individuals at the two corporations even though only one individual owned both. The "sole decisionmaker" rule hardly makes sense in other than the most narrow circumstance, yet this clearly appears to be what the court had in mind, for it distinguished *United States* v. *General Motors Corp.*,[115] on the ground that there, the corporation had two or more agents or officers.[116]

More recently, the Ninth Circuit relied on the "sole decisionmaker" rule in affirming summary judgment for defendants in *Harvey* v. *Fearless Farris Wholesale, Inc.*[117] Plaintiffs, partners in a retail gasoline service station, sued Fearless Farris Wholesale, Inc. and five separately incorporated gasoline service stations, for violating section 1 by cutting off plaintiffs' supply of gasoline. Lind was the sole owner of Fearless Farris Wholesale and each of the five gasoline service station defendants.

The Ninth Circuit noted that previously it had "taken the position that the mere formality of separate incorporation is

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[114] *Id.* at 396.

[115] 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

[116] 94 F. Supp. at 396.

[117] 589 F.2d 451 (9th Cir. 1979).

not, without more, sufficient to provide the capability for conspiracy."[118] The court declined, however, to determine what additional factors are necessary before affiliated corporations will be deemed capable of conspiring,[119] because the sole owner was the sole decisionmaker in the action of which plaintiff complained and thus no conspiracy had occurred:

> [E]ven if the defendant corporations, acting through their officers or agents, were deemed theoretically capable of conspiring, *here in fact no conspiracy, no meeting of two or more minds, occurred*. . . . [P]laintiffs produced no probative evidence that anyone other than Farris Lind—sole stockholder, President and Chairman of the Board of [defendants]—made the decision to refuse to deal with plaintiffs. Mr. Olson's subsequent implementation of this decision does not make him a participant in a conspiracy.[120]

The court, in confining its holding to the facts presented, refused to hold as a matter of law that a finding of conspira-

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[118] *Id.* at 456; *See Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[119] In *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980), the Ninth Circuit considered a number of factors in holding that corporations owned by a single person, who did not participate in the decision at issue, were incapable of conspiring with each other. *Id.* at 617-19. The court, however, did not clarify what factors were needed as a matter of law to mandate such a result. *See* text accompanying notes 168-80 *infra*.

[120] 589 F.2d at 457 (emphasis added).

cy would be precluded where, for example, the sole owner was not the sole decisionmaker.[121]

Only one reported decision has gone so far as to hold that as a matter of law corporations owned and controlled by a single person cannot conspire with one another. In *Rayco Manufacturing Co.* v. *Dunn*,[122] the court granted plaintiffs, affiliated corporations, summary judgment on defendant's section 1 Sherman Act counterclaim because it appeared to the court that "the subsidiary corporations and [their owner] were one and the same person."[123]

The "sole decisionmaker" doctrine makes technical sense and would alleviate the problems faced where an officer or other decisionmaker holds positions in and makes decisions jointly for affiliated corporations. The doctrine does not, however, go very far toward solving the problems raised by the intracorporate conspiracy doctrine. It does not explain why from an antitrust point of view two closely related corporations should be capable of conspiring where the sole owner was not responsible for the decision that is challenged. In other words, why should liability depend on whether one or two individuals made the decision at issue? The sole decisionmaker rule provides little solace in the more common situations where affiliates are not owned by one person, where the decisionmaker does not serve in a dual capacity, or where there are multiple decisionmakers who serve in dual capacities.

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[121] *Id.* at 455 n.8, 458. The district court in *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), *aff'd in relevant part*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), similarly rested its decision on the fact that the sole owner was also the sole decisionmaker in the action complained of. *Id.* at 1358-59.

[122] 234 F. Supp. 593 (N.D. Ill. 1964).

[123] *Id.* at 598.

2. Concerted Action That Restrains No Outsider's Trade

Another approach that courts have taken in attempting to limit the reach of the intracorporate conspiracy doctrine is to distinguish between concerted action aimed at outsiders, which would be actionable, and concerted action aimed only at subsidiaries or affiliates themselves, which would not.[124]

Support for this approach is found in the Report of the Attorney General's National Committee to Study the Antitrust Laws, which interpreted the relevant Supreme Court decisions to mean that "[w]here . . . concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated."[125] Based on this interpretation of the Supreme Court's opinions, most of the members of the Committee went on to "disapprove any application of this doctrine to joint action between members of a corporate family not intended to or resulting in coercive undue restraint on their customers or competitors."[126]

The Attorney General's Report further noted that the Department of Justice had "never brought an action against

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[124] *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981); *aff'd*, 1982-2 Trade Cas. *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859-60 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *REA Express, Inc.* v. *Alabama Great S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *In re* REA Express, Inc., 412 F. Supp. 1239, 1255-57 (E.D. Pa. 1976); *Chastain* v. *A.T. & T.*, 401 F. Supp. 151, 159-60 (D.D.C. 1975); *Williams* v. *Pennsylvania Co.* (*In re* Penn Central Sec. Litigation), 367 F. Supp. 1158, 1166-67 (E.D. Pa. 1973).

[125] Report of the Attorney General's National Committee to Study the Antitrust Laws, 34 (1955).

[126] *Id.* at 35. Professor Sullivan draws the same distinction in his treatise. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 328 (1977).

a parent and its subsidiary corporations . . . charging a conspiracy solely in restraint of the trade of the affiliated defendants,"[127] a policy which appears to have continued to date.[128]

This policy has been applied effectively in several cases in which there seemed little doubt that third party interests were not affected, and where third parties made no such contention. In two such cases, REA Express, after it was purchased by new owners, sued its former owners, numerous railroads which had jointly owned the company. REA alleged that by incurring nonnegotiable debt on its behalf, the railroads conspired in restraint of trade because the railroads agreed with REA and each other on the interest rates, and engaged in other practices in operating REA that restrained trade in violation of section 1.[129] In dismissing the antitrust

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[127] Report of the Attorney General's National Committee to Study the Antitrust Laws, *supra* note 125, at 34.

[128] *See* Willis & Pitofsky, *supra* note 3, at 20-21. Donald Turner, shortly after he took office as head of the Antitrust Division at the Justice Department in the 1960's, indicated that the Department of Justice would adhere to its apparent policy of not pressing the intracorporate doctrine to its maximum. Mr. Turner stated the Department's view on the intracorporate doctrine, as follows:

> We don't generally favor any bathtub conspiracy charge. In fact, it's not the happiest of legal doctrines in any case. But, as the law has developed in this area, it has been considered appropriate to apply the conspiracy doctrine to related companies whenever predatory or coercive conduct is directed against outsiders. . . . It hasn't been applied to internal decisions.

Id. at 21 (quoting BNA Daily Report for Executives A-2 (April 14, 1967)).

[129] *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *In re* REA Express, Inc., 412 F. Supp. 1239, 1241-42 (E.D. Pa. 1976).

claims, the courts relied on the fact that the lawsuits had not been brought by third parties, but rather by a subsidiary against its parent, challenging agreements between them which did not affect third parties.[130]

This distinction, however, has not escaped criticism, not because it is wrong as far as it goes, but principally because it does not go far enough.[131] The fundamental problem with the standard is that the majority of intracorporate agreements are likely to have some effect on third parties.[132] For example, a parent's decision that its subsidiary should lower its prices to increase volume may well take business away from competitors who could claim that the pricing decision was aimed at outsiders and adversely affected them. A decision by a manufacturer that its subsidiary should cut distribution costs by withdrawing from a certain geographic area or refusing to sell to certain customers will obviously have an adverse effect on the subsidiaries' customers. More importantly, emphasis on the effect on third parties is misplaced because it ignores the fact that section 1 permits a variety of single firm behavior which may harm third parties. Moreover, such an approach misses the mark because the focus then is on the competitive impact of the agreement

[130] 427 F. Supp. at 1166; 412 F. Supp. at 1255-57. *See also Williams v. Pennsylvania Co. (In re* Penn Central Sec. Litigation), 367 F. Supp. 1158, 1166-67 (E.D. Pa. 1973) (dismissal of a shareholder's attack on the parent corporation's policies which had the effect of preventing its three real estate development subsidiaries from competing against each other in certain areas).

[131] McQuade, *supra* note 3, at 213; Sengel, *supra* note 3, at 22-27; Willis & Pitofsky, *supra* note 3, at 48-49; *Intra-Enterprise Conspiracy, supra* note 3, at 732-34.

[132] "Any cooperation or coordination between components of a multi-corporate enterprise can adversely affect the trade of outsiders if those outsiders happen to be suppliers, customers or competitors of the corporate unit." Willis & Pitofsky, *supra* note 3, at 49.

rather than on whether two affiliated corporations should be deemed capable of conspiracy. The critical question is not what is the effect of the restraint, but whether defendants are in fact separate entities.

While at least one court appears to have acknowledged implicitly that all intracorporate agreements inevitably restrain trade, it has attempted to draw a further distinction based on whether "the policy exerted an effect substantially similar to that of a conspiracy among independent companies in restraint of trade...."[133] This version of the standard is unsatisfactory because it is essentially meaningless. The court provides no guidelines as to how one determines whether the anticompetitive effect alleged is substantially similar to that of a conspiracy among independent competitors in restraint of trade when the Sherman Act also permits restraints by single enterprises that would be unlawful if engaged in by two competitors.[134]

3. Corporations Not Held Out as Competitors

As part of the effort to limit the intracorporate conspiracy doctrine, some courts have held that no combination or conspiracy exists where the affiliated corporations have not held themselves out as competitors.[135] This doctrine derives from the Supreme Court's emphasis in *Kiefer-Stewart* that the two corporations held themselves out as competitors.

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[133] *Chastain* v. *A.T.&T.*, 401 F. Supp. 151, 160 (D.D.C. 1975).

[134] *Cf. Intra-Enterprise Conspiracy, supra* note 3, at 733-34 (where the *Chastain* standard is criticized for failure to provide any standards for determining whether parent-subsidiary behavior adversely affects third parties).

[135] *E.g., Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1045 (E.D. Mich. 1976); *Call Carl, Inc.* v. *BP Oil Corp., 403 F. Supp. 568, 572-73 (D. Md. 1975), aff'd in part, rev'd in part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

Arguably, the Second Circuit has construed *Kiefer-Stewart* as limiting liability for intracorporate conspiracy to cases where two corporations hold themselves out as competitors. The district court so ruled in *Beckman* v. *Walter Kidde & Co.*,[136] where it distinguished *Kiefer-Stewart* "on the crucial ground that the conspiracy in that case was between two competing subsidiary companies . . . ."[137] On appeal, the Second Circuit, in a per curiam opinion, affirmed "substantially for the reasons and upon the reasoning contained" in the comprehensive opinion of the trial judge.[138]

If that were all, one could confidently assert that the district court's opinion in *Beckman* represents Second Circuit law. However, in *International Railways of Central America* v. *United Brands Co.*,[139] the court of appeals, after summarizing the respective arguments of the parties with regard to the proper scope of *Kiefer-Stewart* and after citing *Beckman*, refused to pass on whether an intracorporate conspiracy is actionable only where commonly owned corporations hold themselves out as competitors.[140] And more recently in *Triebwasser & Katz* v. *A.T. & T.*,[141] the court in a delphic footnote stated that "we cannot agree that the doctrine of 'intracorporate conspiracy' insofar as AT&T and its *non-competing* wholly owned subsidiary Telco are concerned is necessarily applicable,"[142] observing that it had expressly

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[136] 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*,, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972).

[137] *Id.* at 1325.

[138] 451 F.2d at 593.

[139] 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

[140] *Id.* at 240.

[141] 535 F.2d 1356 (2d Cir. 1976).

[142] *Id.* at 1358-59 n.1 (emphasis added). It should also be noted that more recently in *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 602 F.2d 1025 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979), the Second

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declined to decide the issue in the *United Brands* case. The court thus seems to have first opened the door for a reconsideration of *Beckman* and then to have partially closed it in *Triebwasser*.

In *Call Carl, Inc.* v. *BP Oil Corp.*,[143] the Maryland district court concluded that a gasoline marketer and its subsidiary were incapable of conspiring where they were "not competitors in the market in which prices are allegedly being fixed . . . ."[144] Although the Fourth Circuit affirmed the decision, it did so without considering the intracorporate conspiracy question which was not presented on appeal.[145]

While the doctrine that affiliated corporations who hold themselves out as competitors should be obligated to behave as such has a certain surface appeal, courts that have adopted it have not gone further to articulate why the factor should be significant in determining section 1 liability.[146] This is not surprising given the Supreme Court's failure to explain in *Kiefer-Stewart* why the fact that Seagram and

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Circuit, in determining whether a broker should be treated as a distinct economic entity, stated that "[w]hether the two actors constitute distinct economic entities for purposes of the Sherman Act is determined by the economic realities of their relationship." *Id.* at 1031 n.5. In support of this proposition the court cited *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977), the case in which the Ninth Circuit first adopted the "all the facts and circumstances" test. *Id.* at 802 & n.4. *See* text accompanying notes 156-67 *infra*.

[143] 403 F. Supp. 568 (D. Md. 1975), *aff'd in relevant part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

[144] *Id.* at 572 (emphasis omitted).

[145] 554 F.2d at 628 n.4.

[146] *See also* Willis & Pitofsky, *supra* note 3, at 37; *Intra-Enterprise Conspiracy*, *supra* note 3, at 735.

Calvert had held themselves out as competitors made section 1 especially applicable to them.

Commentators Willis and Pitofsky suggest that "[t]he Supreme Court may have had some concept of estoppel in mind."[147] They acknowledge, however, that an estoppel doctrine ordinarily requires a finding that someone relying on appearances changed his position to his disadvantage, a factor to which the Court nowhere alluded in *Kiefer-Stewart*. They note further that the concept of expanded antitrust liability where affiliated companies hold themselves out to the public as competitors is supported by an old line of FTC cases which found deceptive use of subsidiaries to be an unlawful trade practice under section 5 of the FTC Act.[148] Similarly, they rely on *United States* v. *American Can Co.*,[149] where the court, in finding violations of sections 1 and 2 of the Sherman Act, stated that the defendants had resorted to deliberate deception in manipulating several subsidiaries to fight its general line competitors while still maintaining its own prices.[150] Willis and Pitofsky conclude that expanded liability for subsidiaries that publicly adopt a competitive posture is reasonable: "Failure of disclosure might well contribute to the kind of restrictive, single-firm conduct that is difficult to reach under the antitrust laws."[151]

This analysis does not provide a satisfactory or sufficient rationale for holding that affiliated companies as we have defined them are capable of conspiring. The line of FTC cases on which Willis and Pitofsky rely establishes that it is

[147] Willis & Pitofsky, *supra* note 3, at 37.

[148] *Id.* at 37-38. The cases are: *FTC* v. *A.A. Berry Seed Co.*, 2 F.T.C. 427 (1920); *FTC* v. *Armour & Co.*, 1 F.T.C. 430 (1919); *FTC* v. *Fleischmann Co., 1 F.T.C. 119 (1918).*

[149] 230 F. 859 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

[150] *Id.* at 887.

[151] Willis & Pitofsky, *supra* note 3, at 38.

an act of unfair competition under section 5 of the FTC Act for a corporation to conceal its ownership of a subsidiary. Presumably, they anticipate that a rule holding that affiliated companies can conspire where they hold themselves out as competitors will encourage them either (a) not to hold themselves out as competitors, or (b) not to attempt to deceive anyone by holding themselves out as competitors.

However, they reach this conclusion without analyzing whether in all cases affiliated companies that hold themselves out as competitors have concealed their affiliation and are bent on a campaign to deceive their competitors or customers, which seems highly speculative at best. For example, in *Keifer-Stewart*, there is no suggestion that any of Seagram's competitors or customers were unaware of the affiliation between Seagram and Calvert (a fact which was apparently well-known in the industry) or that Seagram was attempting to conceal this fact from the industry to gain some advantage.[182] Although there may be instances in which a corporation attempts unfairly to gain a competitive edge by concealing its affiliation to its subsidiary, there has been no showing that section 5 of the FTC Act is inadequate

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[182] While it might be argued that the consuming public was unaware of the association between Seagram and Calvert, it would not provide a sufficient rationale for the doctrine even if that were the case. For while consumers might believe that Seagram and Calvert were competitors, this apprehension could well occur whether or not the two corporations had been separately incorporated. A corporation by selling two different brands through different divisions may well create the impression that the brands compete, but no one has suggested that this is a sufficient basis for imposing antitrust liability on divisions of the same corporation. *But see Hawaiian Oke & Liquors, Ltd.* v. *Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), *rev'd*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

to the task of policing such behavior[153] or that the problem is so great that it should be supplemented by a private right of action under section 4 of the Clayton Act.[154]

This is not to say that the "holding out as competitors" doctrine is not a useful doctrine. Adopton of this standard by courts clearly would eliminate efforts by plaintiffs to convert unilateral refusals to deal by a subsidiary into conspiracies in restraint of trade where the subsidiary refused to deal at the instructions of its parent. It would similarly make it difficult for plaintiffs to allege price-fixing against subsidiaries where the subsidiary received directions from its parent as to what price to charge. In short, it would eliminate a whole category of lawsuits where plaintiffs have attempted to gain treble damages by alleging conspiracy between a parent and a subsidiary which do not compete. This is not an inconsequential achievement as a review of the decided cases reveals. Indeed, cases in which parent-subsidiary or affiliated companies have held themselves out as competitors are the exception and not the rule in the reported decisions.

There are, however, conceptual problems with implementing the doctrine. For example, what are the indicia of a subsidiary holding itself out as a competitor with its parent or affiliate?[155] It is the fact that the affiliated companies sell the same product or service by itself sufficient or must they take some affirmative action to hold themselves out as competitors? Is the use of separate brands sufficient? How about separate advertising? What if the parent and subsidiary

[153] Indeed, the cases relied upon by Willis and Pitofsky suggest that there is existing law under both the Sherman and FTC Acts designed to deal with the deceptive use of subsidiaries.

[154] 15 U.S.C. § 15 (Supp. IV 1980).

[155] "[T]he elements of behavior that constitute 'holding out' have never been precisely delineated." *Intra-Enterprise Conspiracy*, *supra* note 3, at 735.

share common directors or officers but use different sales forces and different brand names to sell products that compete in the same market? What if one affiliate sells exclusively in one part of the country and the other sells exclusively in another part?

Conversely, would a corporation be capable of conspiring under this doctrine where it competed with its parent, subsidiary or affiliate, but emphasized the fact of affiliation to the industry? Is it possible that a corporation might inadvertently hold itself out as a competitor by advertising or by using a separate sales force when in fact it does not compete with its affiliated companies and does not intend to hold itself out as a competitor? What should be the legal consequences of such action?

4. The "All the Facts and Circumstances" Test

Recently, courts have begun to apply an "all the facts and circumstances" test to determine whether a parent and its subsidiary or affiliated corporations are a single economic entity.[154] Under this test, courts analyze all the facts and

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[154] *First Circuit: White* v. *Hearst Corp.*, No. 80-891-Z, at 4-5 (D. Mass. Apr. 9, 1981); *Second Circuit: Brager & Co., Inc.* v. *Leumi Sec. Corp.*, 429 F. Supp. 1341, 1345 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (1980), *cert. denied*, 101 S. Ct. 2322 (1981); *Sulmeyer* v. *Seven-Up Co.*, 411 F. Supp. 635, 639-40 (S.D.N.Y. 1976); *I. Haas Trucking Corp.* v. *New York Fruit Auction Corp.*, 364 F. Supp. 868, 873 (S.D.N.Y. 1973); *Seventh Circuit: Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). *But cf. Tamaron Distrib. Corp.* v. *Weiner*, 418 F.2d 137, 139 (7th Cir. 1969) (allegations of conspiracy between manufacturers and noncompeting agent held sufficient to state a § 1 claim); *Eighth Circuit: Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981); *cf. TV Signal Co.* v. *A.T. & T.*, 462 F.2d 1256, 1260 (8th Cir. 1972) (holding that whether intracorporate conspiracy doctrine should be limited should be decided in light of actual facts and not determined on the pleadings). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973); *Ninth Circuit: William Inglis*

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circumstances regarding the relationship of the affiliated corporations to determine whether they are acting as independent entities capable of conspiring.

Knutson v. *Daily Review, Inc.*,[157] is the seminal case. Plaintiffs were independent distributors of newspapers published by defendant Daily Review, Inc. which published two daily papers and an advertising circular paper.[158] Codefendant Bay Area Publishing Company, a wholly owned subsidiary of Daily Review, published two of its own papers. Sparks, the controlling shareholder of Daily Review, was also the publisher of both companies' newspapers.[159] Historically, defendants had distributed newspapers through a system of independent dealers and had employed agreements that fixed retail prices.[160] After counsel for plaintiffs wrote Sparks stating that certain provisions of the dealer agreement of both Daily Review and Bay Area Publishing constitued unlawful restraints of trade, defendants notified plaintiffs "that they were terminating their entire independent dealer system for home delivery and were converting to a system of

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& Sons Baking Co. v. *ITT Continental Baking Co.*, 652 F.2d 917, 958 (9th Cir. 1981); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-58 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-03 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Island Tobacco Co.* v. *R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726, 740 (D. Hawaii 1981); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981).

[157] 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[158] *Id.* at 799-800.

[159] *Id.* at 800.

[160] *Id.*

employee-distributors."[161] Subsequently, the dealers brought suit, alleging that the dealer agreements were unlawful contracts that fixed prices and imposed territorial restraints on the distributors. They further claimed that the terminations were made in violation of section 1 of the Sherman Act.[162] The district court found that there was no conspiracy in fact because plaintiffs had not shown that anyone other than Sparks had made the decision to switch from an independent dealer system to employee-distribution.[163]

The Ninth Circuit affirmed, but on different grounds. The court, after raising the question, of "what, if any, limits should be and can be drawn on section 1 conspiracies in the separate incorporation situation,"[164] stated: "Antitrust law is concerned with the concerted action of distinct economic entities. In any case, whether such action has occurred turns on the particular facts."[165]

In determining that Daily Review and Bay Area Publishing comprised a single economic unit incapable of conspiring, the court stressed that the relationship between Daily Review and Bay Area Publishing far exceeded mere ownership: (a) Sparks was the controlling shareholder of each corporation and publisher of all five papers; (b) both corporations had the same individual in charge of important operations, such as circulation; (c) the two alleged individual coconspirators were employees or officers of both firms; (d) all three daily papers had news pages, such as sports and advertising, in common; and (e) Daily Review and Bay Area Publishing neither competed nor held themselves out as

[161] *Id.* at 801.

[162] *Id.*

[163] 383 F. Supp. 1346, 1359 (N.D. Cal. 1974), *modified*, 548 F.2d 795 (1976), *cert. denied*, 433 U.S. 910 (1977).

[164] 548 F.2d at 802.

[165] *Id.* (footnote omitted).

competitors.[166] The court concluded that "[a]rguably on these facts the two corporate units were incapable of conspiracy as a matter of law."[167]

Las Vegas Sun, Inc. v. *Summa Corp.*[168] is also illustrative of the "all the facts and circumstances" test. Plaintiff, the Las Vegas Sun newspaper, sued three corporations, each wholly owned by the late Howard Hughes, which operated hotels in Las Vegas, because the hotels had stopped advertising in plaintiff's paper.[169] The Ninth Circuit affirmed judgment for the defendants and held that they were incapable of conspiring.[170] The court stated that "[t]o determine whether

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[166] *Id.*

[167] *Id.* at 803. The court did not squarely hold, however, that the two corporations were legally incapable of conspiring because plaintiffs failed to show that any trade was restrained as a result of their terminations. *Id.* at 804.

Interestingly, the courts have developed a similar test in the context of § 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1976) (as amended by § 1 if the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936)), for determining whether a transaction between a parent and a subsidiary constitutes a "sale." *See, e.g., Brown* v. *Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir. 1977) (transfer of sheet music and music books between two subsidiaries wholly owned by the same individual, not a sale within the meaning of § 2(a)). In *Brown* the court evaluated all the facts and circumstances of the defendants' interrelations in concluding that the two subsidiaries were "parts of a single integrated enterprise and that transfers between them were indistinguishable from dealings within the same corporate entity." *Id.* at 972. For an excellent discussion of the "all the facts and circumstances" test in the context of § 2(a), see *Island Tobacco Co.* v. *R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726 (D. Hawaii 1981).

[168] 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

[169] *Id.* at 616.

[170] *Id.* at 618.

corporate entities are separate enough to be capable of conspiracy, a court must examine the particular facts of the case before it."[171] It then examined in detail the relationship between the affiliated corporations, emphasizing the following facts: (a) the decision to terminate advertising in plaintiff's paper was made by the same individual for all six hotels; (b) the hotels involved neither competed nor held themselves out as competitors; (c) the hotel casinos represented themselves to the public as a single business entity; and (d) each of the six hotels paid for advertising out of a common corporation's prepaid advertising account.[172] The court thus concluded that plaintiff "essentially dealt with a single economic entity."[173]

The Seventh and Eighth Circuits have recently adopted the "all the facts and circumstances" test as well. In *Photovest Corp.* v. *Fotomat Corp.*,[174] Photovest, a franchisee of fifteen drive-thru photo-finishing kiosks in the Indianapolis area, brought a treble damage antitrust action against its franchisor, Fotomat, alleging that Fotomat had violated sections 1 and 2 of the Sherman Act, breached its contract with Photovest, and fraudulently induced Photovest to become a franchisee in the first place. The court made extensive findings of fact and awarded Photovest treble damages.[175]

On appeal, the Seventh Circuit affirmed the ruling that Fotomat had violated section 1 by requiring Photovest to purchase all of its print processing from Fotomat and lease Fotomat's kiosks as a condition to becoming a franchisee.[176]

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[171] *Id.* at 617.

[172] *Id.* at 618.

[173] *Id.*

[174] 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

[175] *Id.* at 707.

[176] *Id.* at 722, 725. The court also affirmed the district court's ruling that Fotomat had attempted to monopolize the drive-thru

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However, the court reversed the district court's ruling that Fotomat had engaged in an unlawful combination and conspiracy with its wholly owned subsidiary, Fotomat Labs, Inc., designed to eliminate Photovest as a retail competitor in violation of section 1. The Seventh Circuit held that Fotomat and Fotomat Labs, Inc. were a single entity incapable of conspiring.[177]

The court stated that it "must decide each case on its particular facts" to determine whether separate corporations are single enterprises incapable of conspiring.[178] The court concluded that Fotomat and Fotomat Labs should be treated as a single entity because (a) the companies had been incorporated separately to minimize potential labor relations friction; (b) management and offices of the corporations overlapped; (c) profit-related compensation for personnel of both companies was based on Fotomat's profitability alone; (d) the companies used consolidated financial statements for all external purposes; (e) Fotomat's subsidiaries were lumped together with Fotomat and referred to as "the Company" in all publicly circulated financial statements; and (f) Fotomat Labs served solely as a resource for Fotomat and provided no services to non-Fotomat customers.[179] Curiously, although the record indicates quite clearly that the parent and subsidiary did not compete, the court did not expressly rely on this fact. On these facts the court concluded that "[t]o find the two actors necessary for a § 1 conspiracy . . . would not be significantly different from holding, contrary to good author-

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retail photo processing submarket in the Indianapolis metropolitan area in violation of § 2 by, *inter alia*, saturating the market with its own stores as a part of a plan to drive Photovest out of business. 606 F.2d at 714-21.

[177] *Id.* at 726-27.

[178] *Id.* at 726.

[179] *Id.* at 726-27.

ity, that a corporation can conspire in violation of 1 with its wholly-owned, unincorporated sales division . . . ."[180]

The Eighth Circuit recently adopted the same test in *Ogilvie* v. *Fotomat Corp.*,[181] where once again, disgruntled franchisees of Fotomat brought suit. The Eighth Circuit reversed the jury's verdict that Fotomat and Fotomat Labs had conspired to drive plaintiffs out of business. The court applied the "all the facts and circumstances" test to conclude that the two defendants were a single economic entity and thus would be entitled to defend the conspiracy charges on that ground.[182] The court reasoned that allowing the defense would not exalt "form over substance in a manner inconsistent with the intent of the antitrust laws."[183] In holding that there was insufficient evidence to support the jury's finding that the two companies were in fact separate, the Eighth Circuit cited essentially the same facts as those on which the Seventh Circuit relied in its opinion.[184]

The "all the facts and circumstances" test has several weaknesses. First, the test has no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. Presumably, the test is met by an accumula-

[180] *Id.* at 727.

[181] 641 F.2d 581 (8th Cir. 1981).

[182] *Id.* at 590.

[183] *Id.* at 588.

[184] (a) Fotomat referred to itself and its subsidiary collectively as "the Company"; (b) corporate officers of Fotomat always served as officers of Fotomat Labs; (c) bonuses and other executive remuneration over fixed salaries were based on calculations of Fotomat's profit alone; (d) Fotomat Labs had no headquarters separate from those of Fotomat; (e) Fotomat and Fotomat Labs filed consolidated financial statements; and (f) the uncontroverted evidence established that Fotomat had incorporated Fotomat Labs for the purposes of according disparate labor benefits to the two companies' employees and availing itself of certain tax benefits. *Id.* at 589.

tion of facts, individually insufficient, that lead to the conclusion that a parent and subsidiary are no different from a corporation and its unincorporated divisions. The problem is to determine which facts are necessary and why. Suppose, for example, that Fotomat had incorporated Fotomat Labs, not to gain tax benefits and avoid labor friction, but for some other purpose, such as limiting Fotomat's liability? Would that change the result reached by the two circuits? Or suppose that all other facts remained the same but that Fotomat and Fotomat Labs did not share common officers or offices? At what point do the indicia of control become so great that it becomes necessary as a matter of law to treat the two corporations as a single entity? What weight should be given under this test to the fact that two corporations hold themselves out as competitors?

If a corporation permits a subsidiary a large degree of freedom and autonomy, which may be desirable from a business point of view and from the standpoint of efficiency, it may be found capable of conspiring under the "all the facts and circumstances" test. On the other hand, if the parent never lets the subsidiary behave independently the chances are reduced of being held liable for violation of section 1. Faced with these standards, a company wishing to avoid antitrust exposure should exercise as much control as possible over its subsidiaries. At the same time, it must be recognized that the same facts on which the parent will rely to show that it is legally incapable of conspiring may well be relied on by plaintiff's counsel to argue that the requisite combination, contract, or conspiracy under section 1 has been established.[185]

[185] For example, while the fact that management and corporate headquarters of parent and subsidiary overlap may provide an argument that the two corporations are legally incapable of conspiring, this overlap will also increase the chance that in fact the parent is dictating decisions to the subsidiary, which plaintiff's

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There is a question under the "all the facts and circumstances" test regarding what role the jury is to play in determining whether a parent and subsidiary or affiliates are a single economic unit incapable of conspiring. In *Las Vegas Sun*, the Ninth Circuit stated that the district court's finding that Hughes Hotels neither competed with one another nor held themselves out as competitors was not "clearly erroneous,"[186] the standard of review for a fact finding in a nonjury trial. However, the district court in *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*,[187] after submitting the issue to the jury, opined that "[o]n reflection" the question "seems . . . to be more of a legal than factual issue (*at least where as here none of the relevant facts are disputed*) and hence more properly resolved by the Court. . . ."[188]

The inconsistency between these two cases on this issue is more apparent than real. To the extent that there are disputed issues of fact with respect to the presence and nature of the various corporate interrelationships pertinent to the "all the facts and circumstances" test, they must be resolved by the factfinder. On the other hand, where the case is tried to a jury, the jury should not be left adrift in an uncharted

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counsel will seize upon as evidence of agreement or conspiracy under § 1.

[186] 610 F.2d at 618.

[187] 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981).

[188] *Id.* at 859 n.15 (emphasis added). ***But see Broadway Delivery Corp.*** **v. *United Parcel Serv.*, 651 F.2d 122, 126 n.2 (2d Cir.), *cert. denied*, 50 U.S.L.W. 3351 (Nov. 2, 1981) (No. 81-445) (Second Circuit, in affirming the district court's ruling that plaintiffs had abandoned their intracorporate conspiracy claim, stated in a footnote that the Third and the Fifth Circuits have determined that the applicability of the intracorporate conspiracy doctrine is a matter of law and that the Seventh, Eighth, and Ninth Circuits have decided that it is an issue of fact.)**

sea to determine whether separate but affiliated companies function as a single economic unit. That ultimate issue must be carefully framed by appropriate instructions from the court so that the jury is, indeed, finding "facts" and not announcing "law."

If such precise instructions are not provided, the likelihood of inconsistent results under the test increases. While the courts are likely to follow the precedents and hold that the defense is established on fact patterns similar to those found in other cases, there is no assurance that juries, unless instructed precisely as a matter of law as to what facts are sufficient for the defense, will reach the same conclusions regarding similar facts.[189]

III. The Intracorporate Conspiracy Doctrine Serves No Useful Purpose

There is a remarkable absence in the intracorporate conspiracy case law of any antitrust or other public policy justification for the conclusion that affiliated corporations are legally capable of conspiring under section 1 of the Sherman Act. The principal justification to be found is Justice Black's refrain in *Perma Life* that those who have availed themselves of the privilege of doing business through separate corporations must also accept the detriments.[190] This rationale, however, is not directly related to antitrust policy goals. In this section we analyze Justice Black's reasoning and conclude that it does not sufficiently support the intracorporate conspiracy doctrine. We next consider the role of the intracorporate conspiracy doctrine in modern antitrust law. We conclude that the doctrine it used largely in attempts to

[189] In *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), the court noted that "[t]he capacity [to conspire] issue was submitted by the Court to the jury, which apparently encountered great difficulty in dealing with it." *Id.* at 859 n.15.

[190] 392 U.S. at 141-42.

reach behavior not otherwise actionable under sections 1 and 2 of the Sherman Act, that there is no need to fill the gap between sections 1 and 2, and that, in any event, the intracorporate conspiracy doctrine is ill-suited to the intended task. It is not in accord with the goals of section 1 and serves only to confuse the law and encourage meritless lawsuits.[191] The time has come for either Congress or the courts to jettison the intracorporate conspiracy doctrine.

A. Justice Black's Rationale

In *Perma Life,* Justice Black in essence stated as a justification for holding that Midas and its subsidiaries had conspired under section 1 that those who accept the benefits of incorporation must accept the detriments.[192] However, Justice Black's rationale does not suggest that the benefits of separate incorporation affect competition or the competitive process. He makes no attempt to justify the intracorporate conspiracy doctrine on the basis of antitrust policy considerations.

The reasoning of *Perma Life* ignores the salient fact that there is nothing inherently anticompetitive about the use of corporate subsidiaries. Subsidiaries are formed in response to a variety of legitimate legal and financial considerations wholly unrelated to the concerns of antitrust law.[193] More-

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[191] *See* notes 215-34 *infra* & accompanying text.

[192] In *Perma Life* Justice Black also implied that the intracorporate conspiracy doctrine should be upheld in order to facilitate private enforcement of the Sherman Act. *See id.* at 136. Assuming arguendo that this is an alternative rationale for the doctrine, analysis of the intracorporate conspiracy cases indicates that private enfoecement would not be undermined by eliminating the doctrine insofar as the cases can be brought and decided on other grounds. *See* text accompanying notes 58-62 *supra.*

[193] Among the reasons frequently cited for doing business through a subsidiary rather than a division are: (1) greater managerial flexibility; (2) greater financial flexibility; (3) tax ad-

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over, certain of the advantages of doing business through a subsidiary result in economic efficiencies[194] that promote competitive behavior. For example, to the extent that a company is able to cut costs and distribute its products more efficiently through a wholly owned subsidiary because of tax or labor advantages which result from separate incorporation, competition may well intensify. A corporation may decide to create a subsidiary in order to enter a new market that it would not enter without the advantages which separate incorporation provides. In such circumstances competition should increase and consumers benefit. While use of subsidiaries to gain tax and other advantages can be subject to abuse,[195] there is no reason to believe—and neither the cases nor commentaries suggest—that such abuse has any anticompetitive consequences.[196]

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vantages available under the Internal Revenue Code; (4) easier acquisition of new capital; (5) expansion of operations into a new territory or country where local law prohibits or makes onerous operation of the parent within the territory or country; (6) limitation or tort and contract liability; (7) increased efficiencies in production or distribution; (8) facilitation of resort to various accounting methods, tax credit elections, or accounting periods most suitable to specialized needs; (9) facilitation of or avoidance of antidiscrimination limitations on pension and profit-sharing plans; and (10) maintenance of the goodwill or *espirit de corps* associated with a particular subsidiary. See McQuade, *supra* note 3, at 186; Willis & Pitofsky, *supra* note 3, at 27-28; *Intra-Enterprise Conspiracy, supra* note 3, at 728-29.

[194] *See Intra-Enterprise Conspiracy, supra* note 3, at 728.

[195] Willis & Pitofsky, *supra* note 3, at 27.

[196] "One looks in vain in *Perma Life* or in any of the cases on which it relies for any policy justifying a doctrine which on its face is repugnant to common sense. Certainly the use of corporate subsidiaries offends no recognized antitrust policy." *Antitrust Looking Glass, supra* note 3, at 187.

It is not at all clear precisely what the benefits of separate incorporation are from the standpoint of limiting the parent's liability. State and federal courts permit plaintiffs to "pierce the corporation veil" and recover against subsidiaries and their parents, even absent fraud, under a number of alternative theories.[197] This development in corporate law further undermines Justice Black's reasoning. If a corporation so controls its subsidiary that it is liable for the subsidiary's torts or breaches of contract, the parent and subsidiary are treated by the law in effect as a single enterprise. Thus, they obtain no benefits of separate incorporation and under Justice Black's reasoning should similarly be held incapable of conspiring for purposes of section 1. Significantly, in determining whether to pierce the corporate veil courts have stressed a variety of facts which mirror to a large extent those that the Seventh, Eighth, and Ninth Circuits have considered in upholding the single enterprise defense

[197] In formulating a basis for piercing the corporate veil to hold a parent liable for its subsidiary's acts, courts have employed a number of tests to determine whether the parent so dominates the subsidiary that it should fairly be held liable. Under the "identity" theory, separate corporate forms are disregarded and both corporations are treated as one. *See, e.g., United States* v. *Lehigh Valley R.R.*, 220 U.S. 257, 271-74 (1911). A corporation will also be held liable for the acts of its subsidiary where the subsidiary has been labeled the instrument, agent, or adjunct of the dominant corporation. *E.g., Constitution Publishing Co.* v. *Dale*, 164 F.2d 210, 213 (5th Cir. 1947). More popular still are the terms "instrumentality" or "agency" which are frequently used to describe those facts which justify holding the parent liable for the acts of its subsidiary. *E.g, DeWitt Truck Brokers, Inc.* v. *W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685-87 (4th Cir. 1976); *Krivo Indus. Supply Co.* v. *National Distillers & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *modified factually*, 490 F.2d 916 (5th Cir. 1974) (per curiam); *House of Koscot Dev. Corp.* v. *American Line Cosmetics, Inc.* 468 F.2d 64, 66-67 (5th Cir. 1972); *Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc.*, 456 F. Supp. 831, 838-41 (D. Del. 1978).

by separately incorporated companies to determine whether the parent and its subsidiary should be treated as a single entity.[198] Likewise, however, the facts conducive to a finding of intracorporate conspiracy tend to be the same as those which justify piercing the corporate veil.

The Supreme Court has stated that "[i]t is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during its management."[199] As in the "all the facts and circumstances" test, there is no precise set of factors which can be said to be sufficient to establish the degree of dominance required to justify piercing the corporate veil. "The central factual issue is control, i.e., whether the parent corporation dominates the activities of the subsidiary."[200] The fact that the parent owns all the stock of a subsidiary is not sufficient by itself,[201] nor is the fact that the parent and subsidiary share common officers and directors.[202] Similarly, the fact that a parent corporation finances the operations of a subsidiary is not by itself sufficient.[203] Rather, it is a combination of these facts plus other facts and circumstances that establish the dominance necessary for piercing the corporate veil.

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[198] *See* note 206 *infra* & accompanying text. We do not mean to suggest that there is a complete congruence between these factors and how the courts would come out under each of the tests. However, we think it is significant that two different areas of law are grappling with the same factual constructs.

[199] *Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc., 456 F. Supp. 831, 838 (D. Del. 1978) (quoting Consolidated Rock Prods. Co.* v. *Du Bois, 312 U.S. 510, 524 (1941)).*

[200] *Id.* at 841.

[201] *Id.*

[202] *Id.*

[203] *Id.*

In *Fish* v. *East*,[204] the Tenth Circuit suggested the following list of factors to be considered in determining whether to hold the parent liable for the actions of its subsidiary:

> (1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, "the subsidiary" is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.[205]

A review of the cases indicates that the facts relied on by courts in deciding whether to pierce the corporate veil—such as stock ownership, common officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origins of subsidiary's business and assets[206]—are similar to the facts which the

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[204] 114 F.2d 177 (10th Cir. 1940).

[205] *Id.* at 191.

[206] *See Oppenstein* v. *Consolidated Sun Ray, Inc.*, 216 F. Supp. 268 (W.D. Mo. 1963), *aff'd in relevant part*, 335 F.2d 801 (8th Cir. 1964); *cf. Japan Petroleum Co. (Nigeria)* v. *Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978) (where the court refused to pierce the corporate

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Seventh, Eighth, and Ninth Circuits have analyzed in determining that a parent and its subsidiary are a single entity for purposes of section 1. While it is not our thesis that in each intracorporate conspiracy case the parent so dominated the subsidiary that the corporate veil would be pierced under corporate law, it appears that the intracorporate conspiracy doctrine has flourished in an environment which is most conducive to piercing the corporate veil. The greater the dominance of the subsidiary by the parent, the easier it is to prove an actual agreement under section 1. Therefore, conspiracy allegations more likely will be made against parents that exercise a large degree of control over their subsidiaries. Consequently, the benefits of separate incorporation may be less probable in the very cases most likely to result in conspiracy allegations under the intracorporate conspiracy doctrine. In sum, the benefits of incorporation are not so obvious as Justice Black's refrain would suggest.

This is not to suggest, however, that corporations should be able to assert that they are incapable of conspiring only where the parent exercises such a degree of control over the subsidiary that the corporate veil would be pierced. There exist numerous corporations that might well be able to protect themselves from liability under state law for acts of their subsidiaries, which in our view nevertheless should be considered indistinguishable from their subsidiaries for purposes of section 1. Two reasons support this conclusion. First, as we have already shown, corporations are never held liable for conspiring with their own divisions even though the divisions may well have greater autonomy and independence of action than many subsidiaries. Second, as we

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veil and hold the parent liable for the alleged breach of contract by the subsidiary despite numerous overlaps and interconnections between the parent and the subsidiary). *See also Fitz-Patrick* v. *Commonwealth Oil Co.*, 285 F.2d 726 (5th Cir. 1960).

discuss in the next section, there is no antitrust policy basis or justification for holding that affiliated corporations are capable of conspiring, and to do so creates more mischief than it cures.

B. There Is No Need for the Intracorporate Conspiracy Doctrine

None of the courts that have considered or applied the intracorporate conspiracy doctrine has directly addressed the question of whether there is a real need for the doctrine as a matter of antitrust policy. Why should there be an intracorporate conspiracy doctrine in the first place? How does it advance the policies and goals of the antitrust laws?

Rigorous application of the doctrine would merely result in corporations converting subsidiaries into divisions, which in no way advances any antitrust goals. In recognition of this fact, the Justice Department has eschewed the doctrine in the main,[207] as has the FTC after some flirtation with it in

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[207] "We should not press to the limits afforded by past decisions wherever on present evaluation those decisions appear to have gone too far. We should not, for example, attempt to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest." Turner, *Address Before the American Bar Association*, 10 ANTITRUST BULL. 685, 687 (1965). *See also* text accompanying notes 127-28 *supra*.

Moreover, numerous consent decrees provide that the prohibitions therein are inapplicable to activities involving a corporation and its subsidiaries, parent corporations, officers, directors, and employees on the ground that they are a single unit. *See, e.g.*, *United States* v. *Beech Aircraft Corp.*, [1965] Trade Cas. ¶ 71,570 (D. Kan.); *United States* v. *Studebaker Corp.*, [1965] Trade Cas. ¶ 71,410 (D. Neb.); *United States* v. *Elgin Corp.*, [1965] Trade Cas. ¶ 71,339 (N.D. Ill.); *United States* v. *Sperry Rand Corp.*, [1965] Trade Cas. ¶ 71,330 (N.D. Ill.); *United States* v. *Greater N.Y. Roll Bakers Ass'n*, [1964] Trade Cas. ¶ 71,265 (S.D.N.Y.); *United States* v. *Honeywell, Inc.*, [1964] Trade Cas. ¶ 71,224 (D. Minn.); *United States* v. *American*

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the early 1950's.[208] The doctrine has thus played a very small role in government enforcement of the antitrust laws.[209]

It has served principally as a tool for plaintiffs in private treble damage actions to attempt to reach behavior not covered by section 2 and which is actionable under section 1 only if engaged in by two or more entities. The intracorporate conspiracy doctrine has taken seed and grown in private actions because it is easier to prove a violation of section 1 than of section 2.[210] To recover under section 1 a plaintiff must show (1) the existence of a contract, combination, or conspiracy; (2) constituting an unreasonable restraint

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Cyanamid Co., [1964] Trade Cas. ¶ 71,166 (S.D.N.Y.); *United States* v. *Kaynar Mfg. Co.*, [1964] Trade Cas. ¶ 71,121 (S.D. Cal.).

[208] Under a consent order entered in 1954, Schenley Industries was prohibited from conspiring, combining, or even consulting with any of its subsidiaries or affiliated companies with respect to price and related matters. *In re* Schenley Indus., Inc., 50 F.T.C. 747, 751-52 (1954). *See also In re* Distillers Corp.-Seagrams, Ltd., 50 F.T.C. 738 (1954). In the mid-1960's, Schenley petitioned the Commission for a modification of the order, arguing that since its entry, the intracorporate conspiracy doctrine had been discredited and thus the restrictions were no longer warranted. The Commission rejected Schenley's application. *United States* v. *Schenley Indus., Inc.*, [1966] Trade Cas. ¶ 71,897 (S.D.N.Y.). *See Misadventures in Antitrust*, *supra* note 3, at 119-20. Since then, however, the FTC has not pursued cases based on the intracorporate conspiracy doctrine.

[209] *See* Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 452-53 (1973).

[210] "Thus, the intra-enterprise conspiracy doctrine has developed as an *ad hoc* response to the needs of the litigator rather than to foster a clearly-defined economic policy." Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372, 374 (1954).

of trade resulting therefrom,[211] and (3) causing antitrust injury.[212] To prove a violation of section 1 plaintiff must have at least two actors. In contrast, section 2 reaches single firm conduct, but only when plaintiff proves (1) specific intent to monopolize; (2) conduct designed to implement that intent; and (3) a dangerous probability of success;[213] or (a) possession of monopoly power; and (b) willful acquisition or maintenance of that power.[214]

Our review of the intracorporate conspiracy cases indicates that almost half involve disputes between a supplier and its customers arising out of a termination of or refusal to deal, entry by the supplier into competition with the customer, or alleged discrimination by the supplier in favor of its wholly owned subsidiary.[215] We do not believe that there is any

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[211] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59-60 (1911).

[212] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

[213] *See* Handler & Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 125-26 (1980). Plaintiff must also prove, as in the case of § 1, antitrust injury as a result of the violation.

[214] *Id.* at 126 n.8.; *United States* v. *Grinnel Corp.*, 384 U.S. 563, 570-71 (1966).

[215] *First Circuit: White* v. *Hearst Corp.* No. 80-891-Z, at 2 (D. Mass. April 9, 1981); *Second Circuit: Triebwasser & Katz* v. *A.T. & T.*, 535 F.2d 1356 (2d Cir. 1976); *International Rys.* v. *United Brands Co.*, 532 F 2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Reimer* v. *General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981); *Far E. Coconut Co.* v. *Sun Ripe Coconut Corp.*, [1979-2] Trade Cas. ¶ 62,878 (E.D.N.Y.); *Giant Paper & Film Corp.* v. *Albemarle Paper Co.*, 430 F. Supp. 981 (S.D.N.Y. 1977); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110 (E.D.N.Y. 1976); *I. Haas Trucking Corp.* v. *New York Fruit Auction Corp.*, 364 F. Supp. 868 (S.D.N.Y. 1973); *Suburban Car Rentals, Inc.* v. *IT&T*, [1973-1] Trade Cas. ¶ 74,552 (S.D.N.Y.); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 92

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need as a matter of antitrust policy to adopt the intracorporate conspiracy doctrine to police such behavior.

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(1972); *Sanib Corp.* v. *United Fruit Co.*, 135 F. Supp. 764 (S.D.N.Y. 1955); *Ozdoba* v. *Verney Brunswick Mills, Inc.*, 152 F. Supp. 136 (S.D.N.Y. 1946); *Third Circuit: Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Rea* v. *Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1973), *rev'd*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Mt. Lebanon Motors, Inc.* v. *Chrysler Corp.*, 283 F. Supp. 453 (W.D. Pa. 1968), *aff'd per curiam*, 417 F.2d 622 (3d Cir. 1969); *Fourth Circuit: Call Carl, Inc.* v. *BP Oil Corp.*, 403 F. Supp. 568 (D. Md. 1975), *aff'd in relevant part*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388 (D. Md. 1950), *aff'd*, 189 F.2d 79[illegible] (4th Cir. 1951); *Fifth Circuit: H & B Equip. Co.* v. *International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); *Seventh Circuit: Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039 (E.D. Mich. 1976); *America's Best Cinema Corp.* v. *Fort Wayne Newspapers, Inc.*, 347 F. Supp. 328 (N.D. Inc. 1972); *Eighth Circuit: Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323 (8th Cir. 1973); *TV Signal Co.* v. *A.T.&T.*, 462 F.2d 1256 (8th Cir. 1972); *TV Signal Co.* v. *A.T.&T.*, 5 TRADE REG. REP. (CCH) 1981-1 Trade Cas.) ¶ 63,944 (D.S.D. Mar. 13, 1981); *Schaben* v. *Samuel Moore & Co.*, 462 F. Supp. 1321 (S.D. Iowa 1978), *aff'd per curiam*, 606 F.2d 831 (8th Cir. 1979); *Phi Delta Theta Fraternity* v. *J. A. Buchroeder & Co.*, 251 F. Supp. 968 (W. D. Mo. 1966); *Ninth Circuit: Las Vegas Sun Inc.* v. *Summa Corp.*, 610 F.2d 614 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977); *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Island Tobacco Co.* v. *R. J. Reynolds Indus., Inc.*, 513 F. Supp. 726 (D. Hawaii 1981); *Fisher* v. *Coca-Cola Bottling Co.*, [1979-1] Trade Cas. ¶ 62,514(C.D. Cal.); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981); *Alpha Distrib. Co.* v. *Jack Daniel's Distillery*, 207 F. Supp. 136 (N.D.

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It is clear that unilateral refusals to deal and dealer terminations are lawful under the *Colgate* doctrine[216] when engaged in by a single enterprise. Thus, a manufacturer may refuse to deal with a distributor based on its own "business judgment," which the court may not "second guess."[217] Plaintiffs in the dealer termination and refusal to deal cases are typically former dealers, distributors, or franchisees who have been replaced with a competitor by defendants or the defendant subsidiary itself. Such refusals to deal do not give rise to section 1 liability when undertaken by a single manufacturer.[218]

The intracorporate conspiracy doctrine simply provides a technical basis for plaintiffs to attempt to avoid this well-recognized right of a manufacturer to determine unilaterally

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Cal. 1961), *aff'd*, 304 F.2d, 451 (9th Cir. 1962); *D.C. Circuit: Chastain* v. *A.T.&T.*, 401 F. Supp. 151 (D.D.C. 1975).

[216] *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). *See* notes 6 & 18 *supra* & accompanying text.

[217] *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[218] In *Bowen* v. *New York News, Inc.*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976), the Second Circuit stated the applicable rule of law as follows:

> Where a manufacturer simply decides on his own to substitute one dealer for another, and cuts off the former dealer, his decision to sell exclusively to a new dealer does not amount to an antitrust "conspiracy" with the latter, even though the manufacturer has agreed . . . to transfer patronage to him and to terminate sales to the former dealer.

Id. at 1254 (citations omitted). Other courts have reasoned that there is no unreasonable restraint of trade or indeed any effect on competition at all as a result of such substitution. *See, e.g., Ace Beer Distribs. Inc.* v. *Kohn, Inc.*, 318 F.2d 283, 286-87 (6th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963).

to whom he will sell and on what terms.[219] A vertically integrated manufacturer which operates its distribution arm as a division may rely on *Colgate* and refuse to deal. On the other hand, under the intracorporate conspiracy doctrine, a vertically integrated company which operates its distribution arm as a subsidiary risks treble damages if it orders its subsidiary to refuse to deal with a customer. No antitrust goals are advanced by this result, and treble damages would be awarded for what is at most a technical violation of the statute.[220]

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[219] "In the absence of any purpose to create or maintain a monopoly the [Sherman A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919).

[220] Indeed, the Fifth Circuit has warned former distributors against the temptation of treble damages in the typical dealer termination case even where there is evidence of conspiracy among nonaffiliated defendants:

> Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

Burdett Sound Inc. v. *Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975) (citations omitted).

A second category of intracorporate conspiracy cases involve alleged price-fixing agreements.[221] In *Perma Life*,[222] the holding of intracorporate conspiracy was unnecessary to the result reached because there was ample evidence that defendants had required plaintiffs to adhere to their resale prices.[223]

Other intracorporate conspiracy price-fixing cases are clearly designed to reach behavior which would be lawful if engaged in by a single economic entity. In *Keifer-Stewart*,[224] it would have been perfectly lawful under the *Colgate* doctrine for Calvert to have refused to sell to plaintiff had Calvert's policy of refusing to deal been agreed upon with its sister division rather than with its affiliate. In *United States* v. *Arkansas Fuel Oil Corp.*,[225] the district court rejected the notion that "the mere approval by a parent corporation of the price schedules and pricing policies inaugurated and

[221] *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Kiefer-Stewart Co.*, v. *Joseph E. Seagram, & Sons, Inc.*, 340 U.S. 211 (1951); *Du Pont Glore Forgan Inc.* v. *A.T.&T.*, 437 F. Supp. 1104 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157 (S.D.N.Y. 1976), *aff'd mem. sub nom. Souerwine* v. *United States*, 431 U.S. 961 (1977); *Barr* v. *WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975); *Kane* v. *Martin Paint Stores, Inc.*, [1974-2] Trade Cas. ¶ 75,296 (S.D.N.Y.); *United States* v. *Arkansas Fuel Oil Corp.*, (1960) Trade Cas. ¶ 69,619 (N.D. Okla.).

[222] 392 U.S. 134 (1968).

[223] *See* text accompanying note 59 *supra*. Similar, for example, in *Kane* v. *Martin Paint Stores, Inc.*, [1974-2] Trade Cas. ¶ 75,296 (S.D.N.Y.), the alleged price-fixing conspiracy among the parent and its subsidiary to require plaintiff to sell at fixed prices was duplicative of the claim that the franchisee's written agreement had required it to sell at prices dictated by defendants, which would be actionable by itself.

[224] 340 U.S. 211 (1951).

[225] [1960] Trade Cas. ¶ 69,619 (N.D. Okla.).

fixed by the subsidiary corporation . . . constitute[s] a *per se* violation of the Sherman Act."[226]

A third category of intracorporate conspiracy cases involves allegations that the defendant violated sections 1 and 2 by using unfair methods of competition to eliminate plaintiff as a competitor.[227] Typical allegations are that defendant and its affiliate misrepresented facts regarding plaintiff or disparaged its reputation,[228] threatened and intimidated plaintiff, or sought improperly or unethically to influence plaintiff's customers,[229] all with the purpose and effect of driving plaintiff out of business. There is no need for the intracorporate conspiracy doctrine to control such behavior. To the extent that the behavior at issue has actually risen to

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[226] *Id.* at 76,496. In *REA Express* v. *Alabama Great S. R.R.*, 427 F. Supp. 1157 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977), REA Express sued its former owners, numerous railroads, alleging that the agreement between the railroads (then REA's parent corporations), and REA on the interest rates on REA's nonnegotiable debt was a conspiracy in restraint of trade, which the Court rejected as "border[ing] on the frivolous." *Id.* at 1166.

[227] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1974); *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683 (2d Cir. 1963); *Superior Models, Inc.* v. *Tolkien Enterprises*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) ¶ 64,157 (D. Del. June 16, 1981); *Brager & Co.*, v. *Leumi Sec. Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981); *Ozdoba* v. *Verney Brunswick Mills, Inc.*, 152 F. Supp. 136 (S.D.N.Y. 1946).

[228] *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683 (2d Cir. 1963); *Superior Models, Inc.* v. *Tolkien Enterprises*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) ¶ 64,157 (D. Del. June 16, 1981).

[229] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Brager & Co.* v. *Leumi Sec. Corp.*, 429 F. Supp. 1341 (S.D.N.Y. 1977), *aff'd mem.*, 646 F.2d Cir. 1980), *cert. denied*, 101 S. Ct. 2322 (1981).

the level of a dangerous probability of success in a relevant market, section 2 is adequate to the task. For behavior falling short of an attempt to monopolize, existing remedies are available under both the FTC Act and common law principles of unfair competition.[230]

The Federal Trade Commission is empowered to enjoin "unfair methods of competition" and "unfair and deceptive acts and practices," and has pursued its mandate against a variety of behavior similar to that alleged in intracorporate conspiracy cases.[231] The vast majority of FTC cases have related to such practices as false advertising, passing off, deceptive packaging, commercial disparagement, threats of physical violence, and other unfair competitive behavior.[232]

Similarly, the common law of unfair competition reaches such behavior as misappropriation of trade secrets, false advertising and misbranding, passing off, disparagement of competitor's goods, molestation and physical interference, and interference with contractual relations.[233] While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the very same unfair competitive practices are carried out by a company through its division.[234]

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[230] For a complete discussion of the ability of the FTC to reach single firm conduct falling short of an attempt to monopolize and of the remedies available under common law principles of unfair competition, see Handler & Steuer, *supra* note 213, at 174-82.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] A final category of intracorporate conspiracy cases involves a miscellany of alleged practices, but review of them once again suggests that the doctrine serves no purpose. *See Broadway Delivery*

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Finally, to the extent there may be a need to reach behavior not covered by sections 1 and 2 of the Sherman Act, the

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Corp. v. *United Parcel Serv., Inc.*, 651 F.2d 122 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3351 (Nov. 2, 1981) (No. 81-445) (predatory pricing); *Brayman* v. *Bassett Furniture Indus., Inc.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) (exclusive dealing); *United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941) (alleged tie-ins); *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981) (restrictive employment practices); *Las Vegas Drive-In Theatre, Inc.* v. *National Gen. Theatres Inc.*, [1979-2] Trade Cas. ¶ 62,895 (D. Nev.) (bad faith litigation); *Handgards, Inc.* v. *Johnson & Johnson, Inc.*, 413 F. Supp. 921 (N.D. Cal. 1975) (bad faith litigation); *Williams* v. *Pennsylvania Co.* (*In re* Penn Central Sec. Litigation), 367 F. Supp. 1158 (E.D. Pa. 1973) (territorial restraints); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956) (predatory pricing).

Allegations of intracorporate conspiracy merely duplicate existing remedies for alleged unlawful tie-ins and exclusive dealing. Under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), there is no conspiracy requirement, and the requisite plurality of actors under § 1 is supplied in tie-in and exclusive dealing cases by the plaintiff who is the subject of the unlawful requirement. As for territorial restraints, existing case law brands horizontal restraints per se unlawful, *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972), and subjects vertical agreements to a rule of reason analysis, *Continental T.V., Inc.* v. *G.T.E. Sylvania Inc.*, 433 U.S. 36, 47-59 (1977). The requisite plurality of actors is supplied by the party subject to the restriction.

Remedies for predatory pricing already exist under § 2(a) of the Clayton Act. 15 U.S.C. § 13(a) (1976) (as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936)). *See, e.g., Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685, 702-03 (1967). While the courts and the commentators in recent years have engaged in extensive analysis of what cost standard should be applied in determining whether pricing is in fact predatory, no one has suggested that allegations of intracorporate conspiracy add any-

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intracorporate conspiracy doctrine seems ill-suited to the task. It would only reach behavior not rising to the level of a section 2 violation in the fortuitous circumstance where a parent operated through a subsidiary with which an agreement could be shown. It would not reach the same behavior engaged in by another company which did not operate through a subsidiary. If such behavior is to be outlawed, a more evenhanded and less fortuitous approach should be devised.

IV. Conclusion—The Intracorporate Conspiracy Doctrine Should Be Jettisoned

The principal criticism of the intracorporate conspiracy doctrine is that it exalts form over substance without providing any countervailing antitrust benefits. While it might be

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thing to existing remedies for predatory pricing. *See, e.g., O. Hommel Co.* v. *Ferro Corp.*, 5 TRADE REG. REP. (CCH) (1981-2 Trade Cas.) 64, 264 (3d Cir. Sep. 14, 1981); *Northeastern Tel. Co.* v. *A.T.&T.*, 651 F.2d 76 (2d Cir. 1981); *California Computer Prods. Inc.* v. *I.B.M. Corp.*, 613 F.2d 727 (9th Cir. 1979); *Janich Bros. Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

Finally, intracorporate conspiracy claims for bad faith litigation and restrictive employment practices also serve no purpose under the antitrust laws. There is no basis as a matter of antitrust policy for holding that a parent that agrees with or directs its susubsidiary to sue a competitor in bad faith should be liable for conspiracy. In the one reported case involving restrictive employment practices, the court rightly found no antitrust violation because the practices at issue were indistinguishable in purpose and effect from the internal management directives a corporation makes to its divisions, which raise no antitrust concerns. *Thomsen* v. *Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981).

argued in response that section 1 itself exalts form over substance by outlawing only contracts, combinations and conspiracies in restraint of trade and not restraints of trade as such, in fact the distinction in section 1 between single and dual firm behavior is not merely one of form. It is predicated on the concern regarding concerted action between distinct economic units.[235] "The policy consideration for treating an action effected by agreement between two competitors differently from the identical action by a single firm is the desire to maintain and encourage as many independent centers of initiative and decision making as possible."[236] Where the action taken is by two corporations which constitute a single decisionmaking entity by virtue of common ownership or control, application of section 1 will not advance this policy goal but instead will in all likelihood encourage the two corporations simply to formalize their unity to avoid the reach of the Act.

It has also been suggested that section 1 tolerates behavior by a single firm which has the equivalent in market power of a combination of independent companies on the ground that "benefits from technological efficiency of scale more than offset benefits which might arise from dividing that firm into smaller units."[237] Thus, it is contrary to the underlying policy assumptions of section 1 to treat two firms of comparable size differently solely on the basis that one firm has organized itself through use of subsidiaries and the other through divisions.

The question naturally arises, however, as to how thoroughgoing is our criticism of the literal approach. Should the law be that separately incorporated but related corporations are never capable of conspiring? While the

[235] *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

[236] McQuade, *supra* note 3, at 185.

[237] *Id.*

literal approach goes too far in ignoring what is in fact single firm behavior, is there not a point at which common ownership becomes so attenuated that the policy goals of section 1 would be better secured by applying the statute?

We believe that the answer is "yes." Thus, as we indicated at the outset of this Article, our use of the terms subsidiary and affiliate refer to corporations wholly owned or controlled by a common parent. Where a corporation wholly owns another or has sufficient voting control over it so that it can change the corporate form of the subsidiary, there can be little doubt that only one economic entity exists, and that any agreement that it reaches is with itself. The fact of ownership or control means that the form of organization could be changed if those in control should decide to do so. It makes little sense to attempt to use section 1 to require independent behavior where the law of corporations gives the parent the option to eliminate any semblance of independence by operating as a corporation with divisions. Moreover, to the extent that the ownership of the one corporation by the other is the result of an acquisition, as opposed to internal growth, the acquisition may be challenged under sections 1 and 2 of the Sherman Act or section 7 of the Clayton Act.[238] If the acquisition is lawful, because the resulting economic concentration does not unreasonably restrain trade, evidence an attempt to monopolize, constitute an unlawful use of monopoly power, substantially lessen competition, or tend to create a monopoly, then the manner in which the parent chooses to exercise control over its subsidiary should have no antitrust consequences.

However, when two corporations share common ownership which is not sufficient to provide one with control of the other, any contract, combination, or conspiracy between the two takes on a different color. In these circumstances, each obviously has a mind of its own and is not conspiring with

[238] 15 U.S.C. § 18 (Supp. IV 1980).

itself. For example, where Company A holds shares in Company B for purposes of investment only, the fact of Company A's investment does not subject Company B to Company A's will as a matter of corporate law. Accordingly, holding that the two corporations are capable of conspiring does not do violence to the goal of section 1 which is to encourage and maintain as many independent decision-makers as possible.[229]

Of all the tests designed to form a coherent theory of intracorporate conspiracy, the "all the facts and circumstances" test of the Seventh, Eighth, and Ninth Circuits comes closest to defining when two firms are in fact one enterprise on a basis consistent with the goals of section 1. However, as discussed above, its emphasis on the indicia of interrelationships between the parent and subsidiary provides no clear guidelines as to what is sufficient to establish that separate corporations should be treated as a single entity. It thus creates fertile grounds for expensive and time-consuming litigation, at a time when antitrust law is already

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[229] The author of *Intra-Enterprise Conspiracy, supra* note 3, at 735-44, advocates a somewhat similar standard. There, the proposed limitation of the intracorporate conspiracy doctrine would only apply where the parent controls the "day-to-day operations" of its subsidiaries.

Willis and Pitofsky criticize the intra-enterprise conspiracy doctrine and would do away with it except where corporations hold themselves out as competitors or use their subsidiaries with a specific intent to acheive an anticompetitive result. Willis & Pitofsky, *supra* note 3, at 35. They confine their criticism of the doctrine to subsidiaries which are wholly owned or substantially owned, that is, those with no more than a five percent minority interest outstanding which is held by noncompetitors for investment only. *Id.* at 22.

under attack for its extraordinary expense and protracted nature.[240]

On balance, the goal of section 1, encouraging independent decisionmakers to act independently, would be better served by going the next step, and focusing on actual corporate control rather than on discrete facts which tend to indicate control over day-to-day operations. If a parent exercises its control over its subsidiary through numerous daily contacts and integrates the functions of the subsidiary into the parent, thereby leaving the subsidiary with little freedom of action, under the "all the facts and circumstances" test, it has a chance of being held incapable of conspiracy. If, however, the parent chooses not to exercise its control on a daily basis and does little more than provide general guidance as to policies, it may be held capable of conspiracy under the same test. The anomalous result is that the more a parent actually exercises its control, the less likely it is to be held liable for conspiracy under section 1. Conversely, the more a parent permits independence of action, the more likely its occasional assertion of control will result in exposure to section 1 liability. Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to the fullest extent.

Where a corporation has sufficient voting control to effectuate a change in the corporate form of its subsidiary, the subsidiary's "independence" is illusory. To treat the subsidiary as independent for purposes of section 1 may simply insure in the long run that it is not independent.

Almost thirty years ago, when the intracorporate conspiracy doctrine first appeared on the antitrust horizon, it was

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[240] *See* NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL (1979).

termed a "weird concept."[241] Time has not invalidated the accuracy of that judgment. The intracorporate conspiracy doctrine advances no discernible antitrust goals. It has served only to create confusion and to add to the burdens of the already overcrowded federal courts. It is time for Congress or the courts to abandon the doctrine and to encourage application of section 1's strictures against truly independent, and not commonly owned or controlled, corporations.

[241] *Contract, Combination and Conspiracy, supra* note 3, at 46.

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OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY, Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION, Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN COURTS BELOW

November 12, 1976—Complaint of Independence Tube Corporation.

December 15, 1976—Answer of defendant Copperweld Corporation and Counterclaim against Independence Tube Corporation.

January 25, 1977—Answer of defendant Regal Tube Company and Counterclaim against Independence Tube Corporation.

May 24, 1977—Amended Complaint of Independence Tube Corporation.

June 16, 1977—Answers of defendants Copperweld Corporation and Regal Tube Company and Counterclaims against Independence Tube Company and David F. Grohne.

September 15, 1977—Order permitting Copperweld Corporation to name David F. Grohne as additional counterdefendant.

February 22, 1980—Order permitting Independence Tube Corporation to voluntarily dismiss Count II of Amended Complaint (Section 2 claim).

November 14, 1980—Order entering stipulation dismissing Phillip H. Smith as defendant.

February 17, 1981—Jury returns verdict on special interrogatories.

March 6, 1981—Jury returns verdict on damage award.

April 15, 1981—Motions of Copperweld Corporation and Regal Tube Company for judgment notwithstanding the verdict or, in the alternative, for a new trial.

May 27, 1981—District Court's judgment order entering judgment *nunc pro tunc* March 6, 1981 for Independence

Tube Company and against Copperweld Corporation and Regal Tube Company in the amount of $7,512,027 with interest, attorneys' fees and costs.

June 22, 1981—District Court's memorandum opinion denying defendants' motions for judgment notwithstanding the verdict and a new trial.

June 23, 1981—Notice of Appeal.

July 16, 1981—Amended Notice of Appeal.

November 2, 1981—Brief for Appellants.

December 28, 1981—Brief for Appellees.

January 19, 1982—District Court's order awarding Independence Tube Corporation attorneys' fees and costs.

February 10, 1982—Reply Brief for Appellants.

March 31, 1982—Oral Argument.

June 21, 1982—District Court's order awarding Independence Tube Corporation attorneys' fees and costs in the amount of $1,814,672.70.

July 16, 1982—District Court's order further amending award of attorneys' fees and costs to provide interest from January 19, 1982.

October 1, 1982—Seventh Circuit's Opinions affirming the District Court's judgments and jury verdicts.

October 15, 1982—Petition of Copperweld Corporation and Regal Tube Company for Rehearing and Suggestion that Rehearing be *En Banc*.

November 1, 1982—Seventh Circuit order denying Petition for Rehearing and Suggestion for Rehearing *En Banc*.

December 21, 1982—Seventh Circuit order granting appellants' unopposed motion to enter judgment on the award of attorneys' fees and costs and consolidating that judgment with judgment on the merits.

COPPERWELD CORPORATION
STRUCTURAL STRATEGY CENTER
TOTAL MARKET VOLUME
Thousands of Tons

	Actual						Projected											
Markets	1972	%	1973	%	1974	%	1975	%	1976	%	1977	%	1978	%	1979	%	1980	%
1. Structural Shapes	4726		5882	24	5176	−12	5383	4	5598	4	5822	4	6054	4	6297	4	6548	4
2. Structural Pipe & Tube	850		950	11	1028	8	1100	7	1177	7	1260	7	1347	7	1441	7	1542	7
3.																		
4.																		
5.																		
6.																		
7.																		
8.																		
9.																		
10.																		
Total	5624		6843	21	6204	−10	6483	4	6775	4	7082	4	7401	4	7738	4	8090	

Critical Assumptions As the structural tube industry as a whole promotes the use of structural tubing in various industries, the conversion of other structural shapes will progress at an ever expanding rate, provided we are mindful of and will price near competitive shapes.

Data Source AISI 10P Reports; WSTI Quarterly reports by all members.

Note: % is the year-to-year change in volume for each market.

PLAINTIFF'S EXHIBIT 20

COPPERWELD CORPORATION
STRUCTURAL STRATEGY CENTER
COMPETITIVE MARKET VOLUME

Thousands of Tons

	Actual						Projected											
Markets	1972	%	1973	%	1974	%	1975	%	1976	%	1977	%	1978	%	1979	%	1980	%
1. Farm Equipment	120		133	11	140	5.2	147	5	150	2	153	2	156	2	161	3	166	3
2. Sve. Ctr. Stock	409		434	6	453	4.3	487	7.5	511	5	586	14	611	4	634	4	662	4
3. Const. Equipment	65		84	29	92	10	101	10	108	7	149	38	155	4	176	13	180	2
4. Hwy. Guard Rail	20		21	5	22	5	23	4.5	24	4	25	4	26	4	27	3.8	29	7
5. All Others	38		29	−23	43	48	53	23	74	39	98	32	124	26	135	9	168	24
6.																		
7.																		
8.																		
9.																		
10.																		
Total	625		701	12	750	7	811	8	867	7	1011	16	1072	6	1133	6	1205	6

Critical Assumptions ROPS legislation in effect October, 1976, will add up to 100,000 tons to structural markets in 1977 and 1978.

Note: % is the year-to-year change in volume for each market.

COPPERWELD CORPORATION
STRUCTURAL STRATEGY CENTER
COPPERWELD MARKET VOLUME
Thousands of Tons

	Actual						Projected											
Markets	1972	%	1973	%	1974	%	1975	%	1976	%	1977	%	1978	%	1979	%	1980	%
1. Farm Equipment	21	17	25	20	21	20	27	19	32	24	40	26	44	43	50	43	74	44
2. Min. Chr. Equip.	27	9	40	30	44	10	28	6	22	12	70	13	77	12	81	13	87	13
3. Const. Equipment	10	15	15	10	6	3	8	3	7	6	9	8	11	7	15	9	15	10
4. Hwy. Guard Rail	2	10	3	14	3	14	3	6	5	20	6	24	7	27	8	30	9	31
5. All Others	15	49	7	24	10	33	17	65	20	88	24	24	24	27	31	33	30	17
6.																		
7.																		
8.																		
9.																		
10.																		
Total	6857	10	100	14	86	12	79	10	106	15	169	23	190	19	204	10	317	16
% Change From Prior Year		21		21		-11		-14		97		15		6		6		6

Project Assumptions

OSTERWELD CORPORATION
STRUCTURAL STRATEGY CENTER
COMPETITIVE PROFILE

Item / Competitor	Field Service	Quality	Range of Product	Price	Delivery	Overall Competitive Rank
1. Welded Tube Co.	S	0	0	0	0	#1 equal to Regal
2. Unarco—Leavitt	+	–	–	+	0	2
3. Van Huffel	0	0	–	+	0	3
4. Tube & Steel (Essex)	–	0	–	+	0	4
5. Independence Tube	–	0	–	+	0	5
6. Mesh Industries	–	0	–	+	0	7
7. (Additional)	0	0	–	–	0	11
8. Prudential	–	0	–	0	0	10
9. Tool-Tube	0	0	–	+	0	6
10. Jones	0	0	–	+	0	8
11. Unknown	0	0	–	+	0	9
12. Harsh	0	0	–	+	0	12
[illegible]						
1. Jones	S	S	+	+	+	1
2. [illegible]	S	+	+	+	S	2
3. [illegible]				+	0	3

COPPERWELD CORPORATION
STRUCTURAL STRATEGY CENTER
COMPETITORS' PERFORMANCE AND RESOURCES

COMPETITORS (1974) (dollars in thousands)		PERFORMANCE AND OUTLOOK (Discuss share of market, strengths and weaknesses, strategies, resources, etc.)
First	Welded Tube Co. of Amer.	We estimate WTC share of the market to be at 18% to 20% of the market, and increasing at our expense. They have the industries broadest size range and a Vice-President and marketing staff working full time to promote this product. New mill in Philadelphia, very modern and efficient equipment in Chicago. Has broken ground for new tube mill in Birmingham, Alabama, area.
Sales	$ 65,727,000	
EBT	$ 14,376,000	
Assets Employed	$ 44,526,000	
Second	Unarco-Leavitt	Estimated Leavitt sales are 60% of Unarco's total, or over $100 million in 1974. Also have taken option on land in Columbus, Georgia and announced plans for new mill up to 8" sq. Has always been unstable price, current range from ½" sq. × 22 ga. to 4" sq. × ¼". Could have 15% to 20% total market, but entire portion of their sales are in sizes not in our size range. 50% to 60% of Leavitt's sales are structural tubing. (2 sq. - 4 sq.). Imports and mills sizes above their current range.
Sales	$275,933,995 Total Corporate	
EBT	$ 21,099,695	
Assets Employed	$ 94,501,353	
Third	Tube & Steel (Sonco)	Canadian importer with size range 2½" sq. × 3/16 to 6 sq. × ¾. Has been increasingly more aggressive in U.S. market in past two years. They gained substantially at our expense during shortage period of 1974, and have continued on lowered sales force. In addition to the mill in Ontario, they maintain a warehouse of import material in Mobile, Alabama. Sales is actually only the presence of sales into sale for Tube & Steel. Tube & Steel also represents Prudential Steel & Tube Co. of Texas based in the U.S.
70,000 tons		
Sales	$ 35,000,000 (estimated)	
EBT		
Assets Employed		

A-3

PLAINTIFF'S EXHIBIT 34

REGAL TUBE MARKETS AND PLANT LOCATION

Report to

COPPERWELD STEEL COMPANY

July 1972

C-74567

Arthur D. Little, Inc.

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I. SUMMARY

I. SUMMARY

A. PURPOSE AND SCOPE

Early this year Copperweld Steel Company acquired the Regal Tube Company of Chicago, Illinois. This acquisition was made principally to supply Copperweld's Ohio Steel Tube Division with welded structural tubing for further processing into DOM precision tube. Since the acquisition, however, Copperweld has been increasingly interested in the opportunities for Regal structural tubing as a product itself rather than as an intermediate product.

Copperweld Steel must decide whether to build a new DOM fabricating facility at the Regal Tube facilities, at the Ohio Steel Tube complex in Shelby, Ohio or elsewhere. In order to make this decision, Copperweld has retained Arthur D. Little, Inc. (ADL), to estimate the market for structural tubing as manufactured by Regal and to determine the advantages and disadvantages of locating the new DOM facility at Shelby, at Regal Tube, or at some third unspecified location. This report summarizes the results of our investigations in both areas.

B. MARKETS FOR STRUCTURAL TUBING

Regal Tube's sales of structural tubing should grow from 68,000 tons in 1971 to 114,000 tons in 1975, and to 167,000 tons in 1980. This increase represents a compound rate of growth of 14% per year through 1975 and 8% per year from 1976 to 1980. We expect the geographic distribution of the structural tubing market will remain essentially as it was in 1971. The greatest growth will be in products 4" to 8" in diameter, with a gradual rather than a sudden increase in average tubing size.

Farm equipment and industrial and commercial equipment markets will be the principal outlets for the Regal tubing line. These large, rapidly growing markets—which use larger sizes of tubing—should be pursued aggressively by Regal.

Transportation and recreational vehicles, building construction and other miscellaneous markets will experience GNP type growth rates of up to 5% per year. The transportation sector uses small tubing sizes for the most part, is extremely fragmented, and is cost sensitive. The building construction market, in our judgment, cannot grow rapidly unless significant market development monies are expended in design handbook publication, system development and extensive promotion to the thousands of practicing architects throughou the country. Other markets—such as that for materials handling equipment—are fragmented, tend to use small-diameter tubing, and are very cost sensitive. These miscellaneous markets are best served on an opportunistic basis.

The ROPS and guard rail markets are similar in that they represent potentially explosive growth opportunies, but we recommend that Regal approach them cautiously and not expect to achieve major penetrations in either market in the short term. The ROPS markets is technically complex, and is deeply involved in goverment regulations. Despite its projected rapid growth rate, this market may require from Regal more capital investment, administrative effort and marketing time than it is worth. We recommend that Regal investigate this market thoroughly and determine the costs and benefits of entry before pursuing it aggressively. Similarly, the guard rail market requires an extensive promotional program focused on buyers currently alien to Regal—federal and state highway authorities. If this market matures it will be so large that it probably will attract new welded tubing producers—perhaps even the basic steel companies themselves. The implications of such a development need to be considered carefully.

C. DOM FACILITIES LOCATION

Of the three candidate sites—Shelby, Chicago, and a green grass location—we recommend Chicago because this site offers the lowests costs, the greater flexibility, and the least

risk of physical catastrophe, environmental damage, or labor difficulty.

Consequently, we recommend that Copperweld install the new DOM facility at the Regal Tube location and immediately acquire land abutting this facility to be sure there is adequate space available not only for the DOM finishing facility but for an additional tube-welding facility as well.

II. THE MARKET FOR STRUCTURAL TUBE

II. THE MARKET FOR STRUCTURAL TUBE

A. THE MARKET OVERVIEW

Historically, the structural tube market has grown through the substitution of lighter-weight, less expensive, welded tubing for channels and angles in existing applications. The primary impetus behind this substitution has been the desire to reduce the total cost of producing a given member. In most sectors, improved appearance has been a secondary consideration.

Since the capital investment to produce smaller tubes, less than 4" square is low, this part of the market is very competitive and there are many small local firms. In fact, in different Regal sales regions, there are a quite different set of producers. Furthermore, the smaller companies tend to have lower overheads and different profitability objectives than Regal, and therefore are able to be very effective price strategists.

Regal is in a much more favorable competitive position in the market segment of larger tube sections (4" square and over), a larger capital investment is required, and the few competing companies tend to be similar to Regal in size and overhead burden.

In all segments of the market price is the key determinant of sales. However, price means not only the direct price comparison of one welded tube producer versus another but the comparative values in use. If the customer substitutes a tube for a pair of channels that must be welded together, he measures not only the difference in materials costs but also the savings in labor costs that can be expected by eliminating an in-house fabrication step, by requiring less time for installation, etc.

To most customers, welded tubing represents a relatively small proportion of their total metal purchases. Basically, welded tubing is a commodity-type product. Customers view the various welded tubing products as being undistinguish-

able from one producer to another, except where one firm may offer a special price, special service, or a special size.

This market is very diffuse. There are an extremely large number of actual and potential customers, and countless applications. Thus, there are too many non-standardized accounts to service efficiently through salaried salesmen. Consequently, a manufacturer needs a small core of inside/outside salesmen, and a larger group of representatives. Because these markets are so diffuse, a manufacturer must also depend on service centers for about 70% of his sales.

To service centers, welded tubing represents a low-value item. Service centers, therefore, are interested in turning their inventory over rapidly and price is a key way to do it. To large service centers, however, while welded tubing represents a relatively small portion of its sales, it does represent one of the few products which is contributing more than 2-3% per year to sales growth; thus, this does spark their interest in carrying and selling the product.

Consequently, pricing remains a key issue. The larger the order the more likely a producer is to price under "list." Such practices are more frequent in the smaller sizes because of the nature of the competition. The challenge to a given producer is how to anticipate the need to reduce price, how far, and how to be innovative in doing it (e.g., credit terms, quantity discounts).

The common sales approach in this industry is to call on as many customers as possible to introduce them to welded tubing. Little intensive customer education had been tried prior to the advent of Roll Over Protective Structures. Frequently, the customer initiates the request for information about welded tubing. Customer education seminars, aimed toward large potential users, can be a valuable sales tool.

The growth potential in this market is still high; a substantial amount of substitution is yet to be made. Nevertheless, price will continue to be an important factor. Welded

Tube of America, the principal Regal competition in the large size market, is likely to continue to be somewhat of a price cut leader because of excess capacity.

B. REGAL'S POSITION IN THE MARKET

Regal's products and its sales personnel are generally well regarded in this market. Regal has built a strong position in this rapidly growing market and is well situated for further growth.

Although Regal's position is due in part to the efforts of its own salesmen, an effective relationship with service centers and representatives has been an important element in its success. Some of the service centers, particularly the large, general-line houses, become a little nervous when Regal begins to talk about doing some of its own fabrication. They see this as being somewhat of an encroachment upon their own area of operations. To some extent this is true. But, fabrication also offers Regal a mechanism to improve customer service and to differentiate its product. Regal must be cognizant of the negative feeling on part of the service centers and salve any possible hard feelings before they arise. By a carefully-constructed strategy, with a bit of finesse, it should be possible for Regal to become a light fabricator and to maintain its good working relationships with the service centers in certain markets with selected customers.

Copperweld's acquisition of Regal is generally seen in the marketplace as a favorable factor. As long as Regal continues to service its welded tubing accounts effectively, the association with Copperweld will have a beneficial effect. There is concern by some customers that Copperweld may have purchased Regal simply to supply shells to its DOM facilities, and will ultimately drop some of Regal's present customers. This belief must be eliminated. On balance, Regal is in a good position to capitalise on its reputation and continue to participate in this growing market.

C. MARKET POTENTIAL FOR REGAL

Table 1 presents the prospects for Regal's sales of welded tubing in key market sectors through 1975 and through 1980. These estimates represent our estimates of the sales level Regal is likely to achieve based on the following assumptions:

- Regal will maintain its current market share, growing with the total market. Thus our sales projections represent total industry growth as well as Regal's own growth.
- Regal will maintain a constant sales cost per dollar of sales during this period by continually expanding its outside and inside sales and marketing programs.
- Neither Regal nor the industry collectively will undertake new aggressive market development programs.
- ROPS (roll over production structures) and guard rail markets will not consume large quantities of welded structural tubing.

As Table 1 indicates, Regal sales will be 114,000 tons per year by 1975—which works out to a growth rate of 14% per year. Although this growth rate is only about half of the growth rate that Regal has been experiencing since 1969, it is a healthy rate. Furthermore, it is a rate that is well within Regal's capability to attain. Below, we describe the principal market sectors.

TABLE 1

CURRENT AND PROJECTED REGAL STRUCTURAL TUBE SALES BY MARKET SECTOR (thousands of tons)

	1971	1975	1980	Percent 4" and Greater
Farm Equipment	32	60	85	50
Industrial & Construction Equipment	17	27	40	50
Transportation & Recreation Vehicles	7	12	24	35
Construction	4	5	6	60
Guard Rail	4	5	6	100
ROPS	0	0	—	65
Miscellaneous	4	5	6	20
Total	68	114	167	
Annualized Growth Rate		1971-75	1976-80	
		14%	8%	

1. **Farm Equipment**

This industry sector is the most well-defined, most concentrated, and most amenable to direct sale and shipment. Nonetheless, even here welded tubing is used for a variety of applications, and many orders are for 30,000-40,000 pounds and less. Thus even this sector cannot be serviced only by salaried Regal salesmen.

Table 2 summarizes the farm equipment market. Although this is the market sector which is penetrated to the largest extent by welded tubing, it is still, at best, 50% penetrated, and substantial substitution-based growth is still likely. For example, John Deere & Co., which probably purchases more welded tubing than any other single account (more than $8 million per year) is still welding a substantial amount of plates to channels. John Deere's Plow and Planter works has indicated a willingness to continue to work welded tubing into its plows as it redesigns the products. Furthermore, the recent availability of thicker-walled tubing (½" wall thickness) has opened up many new uses for welded tubing.

TABLE 2

FARM EQUIPMENT PROFILE

Sector Trends

- Total value of shipments 1969: $4.2 billion.
- Growth rate: 2-3% per year (constant dollars).
- Implements becoming more complex, wider and larger, although producers attempting to *not* increase total weight.

Tubing Applications

- Mainly as frames on field preparation and cultivation implements (large and small sections).
- Bracing on equipment and general implements.
- Approximately 50% is 4" and above.

Potential for Welded Tubing—Regal

- Regal sales 1971: 32,000 tons.
  Regal sales 1975: 60,000 tons.
  Regal sales 1980: 85,000 tons.
- Tube penetration 1971: 50%.
  Tube penetration 1976: 85-90%.
- John Deere, Massey Ferguson—progressive, good potential.
- J.I. Case—slow to react, largely unconverted, good potential.
- International Harvester—vested interest, poor to moderate potential.
- Smaller, limited line firms—good potential.
- Service centers should continue important, but manufacturer concept selling also important.
- Light fabrication—an asset to most customers.

This sector will grow slightly slower than GNP, 2-3% per year, through 1975. However, the progressive implement manufacturers are doing a substantial amount of product redesign. Therefore, we expect sales of structural welded

tubing in this market to increase 15% per year through 1975, and then moderate to 5% per year in 1975-80, as substitution slows.

Over the last few years larger and more powerful tractors have been built, to pull heavier implements at faster speeds. Recently, however, the tractor manufacturers have been displaying some interest in putting a ceiling on horsepower, reasoning that present equipment speeds are approaching their maximum. Thus, they have tended to avoid increasing the weights of the implements, or even to reduce them. At the same time there has been a trend toward more complex, larger, and wider implements that will plow, seed, or weed a larger area in a single pass. Both trends favor structural welded tubing since frequently a lighter-weight section of welded tubing can replace a channel, angle, or solid shape.

Until the last few years, most tubing had been 4" sections or smaller. A trend toward larger sections for frames on field and cultivation implements in line with their increased size and complexity has developed, however, and now approximately half of all tubing used is of 4" sections and above. The hitches, which attach the implement to the tractor, also tend to be made of the larger-size tubing. Most of the smaller tubing used in farm implements goes to form support bracing. The sector growth rate is achievable; Regal is quite well-connected—through the efforts of its regional representatives, service centers, and company salesmen—with farm belt companies, particularly John Deere. As long as Regal is able to remain on top of design changes at the large equipment manufacturers, it will be able to participate meaningfully in this growth.

Large manufacturers, of course, are where the large sales dollars are. Dealing with these companies, however, is almost like dealing with many separate firms. That is, engineering design and purchasing decisions are very much decentralized. Some basic materials and design specifications are written out of the corporate offices, but the individual manufacturing locations tend to have a significant amount of

freedom in choosing their own materials. Thus, while it is necessary to maintain a presence at the corporate offices, the real sales effort comes at the level of a given division or plant.

John Deere and Massey Ferguson represent two very progressive companies in this industry which offer good potential. Although J.I. Case uses less tubing than Deere or Ferguson, it is not innovative; it has been very slow to react to changes. More customer education is necessary to convince Case to use more tubing in its products. International Harvester does not represent as good a potential as even Case, since it has a vested interest in its own steelmaking facilities and is tied to a greater extent to channels, angles, and welded tubes manufactured in-house.

Many smaller, limited line firms participate in this industry. These companies frequently have less technological capability and, therefore, either follow the lead of the majors or require more basic education from the welded tubing supplier. On the other hand much less time generally must be invested to change these companies over to welded tubing than is the case for the larger manufacturer.

As Regal has already discovered, small, limited line manufacturers, e.g., Lahman Manufacturing in Hecla, South Dakota also represent a good potential. To convert these companies to greater tubing use is a matter of ferreting out where they are located and what products they produce and then educating the customer about application of welded tubing.

Light fabrication, e.g., sawing to lengths and punching holes would be viewed as an asset to most customers especially the large implement manufacturers. Many manufacturers would certainly prefer to reduce the headache of in-house fabrication and reduce the number of variables which its assembly people have to deal with.

However, Regal must be careful not to alienate its service centers, because even in this market service centers will

continue to be very necessary. In 1971 only about 23% of Regal's sales in region 10 (the farm belt) went directly to a customer. The remainder was either sold by a service center and shipped direct or sold by a service center out of its own inventory. Because of the nature of this market, it is unrealistic to assume that Regal could increase direct sales to much more than 30%. Thus, Regal must be cognizant of the importance of the service centers and must continue to cultivate a strong relationship with them.

2. Industrial and Construction Equipment

This market sector includes a large number of different products and an even larger number of applications. The market as a whole is growing at the rate of 10% per year, and should continue to grow at nearly this rate through the mid-1970's. Table 3 summarizes the key variables in this market sector.

Structural welded tubing has at least an initial position in this market and should continue to participate strongly in continued growth. Unlike many applications in the farm implement/equipment sector, however, most of the tubing applications here are for short lengths and a small amount of tubing used per piece of equipment. These characteristics mean smaller purchases per order on the part of the customer and more difficulty to the tubing manufacturer in anticipating customer needs or developing specialized products to suit the customer's needs.

Much of the equipment in this market is fairly heavy equipment that requires large tubular sections. Thus, we estimate that approximately half of this total market consumes 4" square and larger welded tubing. Typical applications for tubing include braces for light and heavy construction equipment, bases for industrial machines, equipment frames (not nearly to the extent as in farm equipment, however), housings for wires on equipment, conveyor and other automatic handling equipments of support pieces, and literally hundreds of other applications.

Regal sold 17,000 tons of tubing to companies in this market in 1971; we estimate a growth rate of 20% per year for Regal through 1975 (27,000 tons) and 10% per year (40,000 tons) for the period 1975-80. Even with this kind of a growth rate for Regal, which should parallel the total penetration of tubular products in this sector, welded tube will only have attained approximately a 20% penetration level by 1976, versus a 10% penetration level at present. This figure is indicative of the growth potential that remains in this market, although, admittedly, because of its fragmentation the potential is going to be difficult to reach.

TABLE 3

INDUSTRIAL AND CONSTRUCTION EQUIPMENT PROFILE

Sector Trends

- Total value of shipments 1969: $16.7 billion.
- Growth rate 1969-1975: 5% per year (constant dollars).

Tubing Applications

- Myriad applications, most of relatively short lengths, small amount per piece of equipment (vis-a-vis farm implements).
- Bracing, machine bases, wire housing, equipment frames, conveyor support pieces, etc.
- 50% is 4" and above.

Potential for Welded Tubing—Regal

- Regal sales 1971: 17,000 tons.
  Regal sales 1975: 27,000 tons.
  Regal sales 1980: 40,000 tons.
- Tube penetration 1971: 10%
  Tube penetration 1976: 20%
- Large accounts (Caterpillar, Allis-Chalmers) generally offer good potential.
- Market is impossible to service directly; too many small accounts; efforts of reps and service centers critical to participation in this market.
- Light fabrication less feasible here because of reliance on service centers, and fragmented nature of customer's needs.

Large accounts e.g., Caterpillar, Allis-Chalmers, generally offer good potential since they represent concentrated pockets of purchasing power. To a large extent, these accounts can be serviced directly by Regal's salaried salesmen. Here too, however, engineering design and purchasing are decentralized, and frequently the customers order in quantities of less

than 40,000 pounds. These characteristics indicate the need for reliance on service centers.

The bulk of this market is too fragmented to service with the present sales organization and too diffuse to serve with salaried salesmen, because of the extreme fragmentation. Additional sales representatives and continued reliance on service centers are critical if Regal is to continue to increase its share.

Because of the stronger reliance on service centers in this sector and diversity of the customer's needs, light fabrication is less feasible. Service centers are most important in this market, and Regal must exercise extreme caution not to disrupt the service center relationship.

3. Transportation and Recreation Equipment

This market is extremely diffuse, both in terms of the number of accounts and the kinds of applications. As Table 4 indicates, applications range from frames and hitches for various kinds of trailers, to protective structures for railroad cars to protect automobiles in shipment, to sundry bracing and supporting applications. Since many of these are for small sections, e.g., 2" square trailer hitches, we estimate that only 35% of this market uses larger section tubing. The trend, however, is toward larger sections as equipment—for example, trailers and their hitches—gets larger.

Although the market as a whole has grown at a rate of 7½% per year, we project only a 5% per year growth rate through 1975. Nonetheless, because of the limited tube penetration at present (10% in 1971), we believe that Regal's sales can grow at an annual rate of nearly 15% through 1980. The recreation sector of the market should grow faster than the general transportation sector as leisure time increases and recreational activities become more important.

Thus, we expect Regal sales to increase from 7,000 tons in 1971 to 12,000 tons in 1975 and 24,000 tons in 1980. Regal can achieve this growth by concentrating on the recreational

vehicle area and on new applications in general transportation markets, such as rail car protective devices.

As in the commercial and industrial sector, Regal faces a very fragmented market. Service centers are of key importance and will remain so. Again, Regal must maintain good relationships with these service centers. Although fabrication would be beneficial to many customers, the service centers are wary and will continue to be so. Regal must approach the service centers with care.

4. Roll Over Protective Structures.

Roll over protective structures (ROPS) represent an infant market sector which is on the verge of burgeoning. Because of federal and state safety legislation, ROPS will be utilized on virtually all new farm equipment and industrial and construction equipment. Table 5 represents a profile of this market. This market is truly enormous. For example, International Harvester estimates that it will purchase 30,000 tons per year of 4" and above tubing, whereas it now purchases only about 4,000 tons. This suggests that John Deere would also purchase about 30,000 tons, and that the market for ROPS in just the farm equipment sector of the total market could be 100,000-200,000 tons per year.

TABLE 4

TRANSPORTATION AND RECREATION PROFILE

Sector Trends

- Total value of shipments 1969: $83 billion.
- Growth 1969-1975: 5% per year (constant dollars).
- Increased leisure time and recreational activities, plus continued high personal mobility spurs growth.

Tubing Applications

- Myriad of applications, such as industrial and construction equipment; short lengths, small amount per unit.
- Trailer (boat, truck, camping) frames and hitches, railroad car protective structures, bracing and other supporting applications.
- 35% is 4" square and above.

Potential for Welded Tubing—Regal

- Regal sales 1971: 7,000 tons
  Regal sales 1975: 12,000 tons
  Regal sales 1980: 24,000 tons
- Tube penetration 1971: 10%
  Tube penetration 1975: 20%
- Recreational vehicles (campers, boat, trailers and hitches), plus new applications in standard markets (rail car protection) key areas of growth.
- Market: very fragmented; numerous medium-small accounts, unsophisticated technologically.
- Service centers of key importance.
- Light fabrication beneficial to customers, but service centers will be wary.

TABLE 5

ROLL OVER PROTECTIVE STRUCTURES (ROPS) PROFILE

Sector Trends

- Infant industry—as yet undefined.
- OEM—design and manufacturing; large firms; captive design, captive and subcontracted manufacturing; small-medium firms; more subcontracted.
- "Retrofit": independent, peripheral manufacturers, not much "captive."
- Seamless, hot worked (or normalized) welded tubing products of choice.

Tubing Applications

- Cold worked welded tubing not in mainstream; only few customers presently seriously considering cold-welded for significant use.
- 65% is 4" square and above.

Potential for Welded Tubing—Regal

- Potential for Regal's present product line—low; opportunity, as is, will be based on "fill in" orders, less critical items.
- Total potential for ROPS, very large, e.g., International Harvester—30,000 tons.

Large firms in this industry will design their ROPS in-house, but some will subcontract the manufacturing. To the extent they subcontract, the market will become more fragmented. Large firms may be able to be convinced to specify a generic kind of tubing, but it is unlikely that they will write specifications around a specific manufacturer's tubing. Small-medium sized firms, of course, will subcontract more design as well as manufacturing.

Manufacturers will produce little ROPS to retrofit their own equipment. Most of these structures will be designed and manufactured by independent, peripheral manufacturers. Thus, a whole new industry will spring up.

It is our assessment that welded tubing, as is, will be more than a marginal competitor and that the potential for roll over protective structures will remain unrealized for manufacturers of cold worked welded tubing. Seamless products, or hot worked (or normalized) welded tubing products will dominate this market. To the extent that welded-tubing manufacturers are willing to expend additional capital (e.g., in-line furnaces) they will participate in the market.

At present, such manufacturers as International Harvester and Caterpillar project that nearly two-thirds of their usage of steel for ROPS will be of 4" square or above. It is, of course, difficult to tell how actual designs will develop and to say that 65% of ROPS will be sections of this size is somewhat tenuous.

Again, however, we must emphasize that the potential for Regal's product line, cold worked welded tubing, is low. The few opportunities that will exist will be based on an occasional application for less critical equipment. That is, if minimum test performance is required for example, for a piece of equipment which will be used in a warmer climate—welded tubing might qualify. For most applications, however, it will not.

5. Guard Rail

The market for welded steel tube as guard rail is relatively unexploited and offers excellent growth potential. On the basis of FHA statistics and our own experience, we estimate that the total market for guard rail in 1971 was 30 million linear feet. (See Table 6.)

The use of guard rail per mile of highway has increased about 20% over the last seven years, primarily because of greater emphasis by federal and state highway departments

on motorist safety in highway design. Also, the expansion of the high-speed interstate highway system has required greater use of guard rail than have local streets and highways. The replacement market is also developing rapidly. The growth rate for guard rail is thus projected to be 6% per year, slightly greater than the expected 4% growth rate for highway construction, because we assume the trend toward increased usage of guard rail per mile of new highway construction will continue.

The majority of the guard rail used in the United States is either the steel "W" beam (deep beam) type or the cable type. Both of these have been well tested and widely accepted for many years and can be classified as large-volume commodity products. In recent years welded steel tubes (box beams), aluminum beams, and concrete barriers have come into usage—primarily in medians, bridge approaches, and as protection for signs or other fixed objects.

Federal regulations require guard rail protection under certain specified circumstances, but the type of product to be used is determined primarily by the state highway department. A contractor bidding on a guard rail contract bases his bid on the lowest-cost product that meets the specifications, which has the effect of eliminating the box beam, aluminum and concrete barriers because of the higher cost. These products are used only where specifically required. Almost all states depend primarily on "W" beams and cables but do specify (often on an experimental basis) the other types under special circumstances.

TABLE 6

GUARD RAIL PROFILE

Sector Trends

- Total market 1971: 30 million lineal feet. 1-2% welded tube.
- Total market growth: 6% per year.

Tubing Applications

- Tube used as lane separators where width of median is small and minimum deflection required.
- Significantly more expensive than double "W" beam but offers unique performance.
- Approximately 100% if for over 4".

Potential for Welded Tubing—Regal

- Regal sales 1971: 4,000 tons
  Regal sales 1975: 5,000 tons
  Regal sales 1980: 6,000 tons
- Selling to this underdeveloped market requires totally different approach than selling to industry. To grow significantly then, Regal must work with government specifiers for extended periods of time.

In calls to more than 20 state highway departments, the Federal Highway Administration, and several research groups, we found widely varied and often conflicting impressions about box beams. To those familiar with them, they were generally acknowledged to be a good product, desirable primarily in medians and bridge approaches. Box beams normally have been used where the median is too narrow to effectively use the double "W," but where the median is wide enough so the deflection caused by an impact will not intrude into the traffic in the opposite lane.

The box beam is more costly than the cable and W beam although the cost varies significantly in different areas of the country. Box beams are $11-14 per linear foot installed,

which is $3-6 per linear foot greater than the double W design in every location.

When compared to the concrete barrier, the box beam also offers the advantage of some deflection and thus less dangerous deceleration. It deflects less than the cable or single "W" and thus is appropriate where deflection must be controlled.

Concrete barriers are used where no deflection is permissible. They are also popular in heavily traveled urban areas where any maintenance after an accident would be extremely difficult to perform. However, the concrete barriers are the most costly system in many areas, and in northern climates they hinder snow removal.

Perhaps the most significant findings in our interviews were the misconceptions. Most of the interviewees in states without experience with box beams (and also frequently those in states where the box beam has been used) were not really aware of the characteristics of the box beam. Some responded that it was too rigid; others that it was too flexible; some that it was generally "unsafe," etc. In our estimation this lack of product awareness suggests an unexploited opportunity. New York's extensive experience with box beam and continued commitment to its usage suggests that the further exposure of the system in other states would be beneficial.

In New York it has been estimated that 20-25% of total guard rail requirements (in lineal feet) will use box beam. On a natioal basis, a similar percentage suggests a market of about 7 million feet, 90,000 tons per year, or $18 million.

6. Building Construction and "Other"

As shown on Table 7, Regal is shipping about 4,000 tons of structural tube per year to the construction industry, excluding guard rail applications. It believes that this market represents one of the greatest opportunities for structural tube in the future. In our projections of future sales, we have estimated a 5% per year growth for this sector.

TABLE 7

BUILDING CONSTRUCTION

Sector Trends

- Growth: GNP rate (4.5-5% per year).
- Highly fragmented; many end uses, many decision makers. Cost sensitive.

Tubing Applications

- In construction—columns, spandrels, handrails, etc. Trends toward larger sizes.

Potential for Welded Tubing—Regal

- Regal sales 1971: 8,000 tons
  Regal sales 1975: 10,000 tons
  Regal sales 1980: 12,000 tons
- Tube penetration: Less than 1%.
- Construction market: needs design handbooks—systems development, architectural promotion—to exceed this growth rate. Economics of such activity questionable.

The current construction market for heavy shapes is about 2.8 million tons with an additional 0.4 million tons of light shapes for a total of 3.2 million tons. The construction market for more expensive welded structural tube is probably between 20,000 and 50,000 tons—more like 20,000—or significantly less than 1% of the structural shape market. Because structural tube has such an insignificant market share, it is unlikely that a driving force can be created to change this penetration rate significantly. Product promotion is essential and the basic steel producers have the established organization to promote. We think it unlikely that the tube industry could compete with the structural manufa turers to provide the necessary product promotion.

There are approximately 100,000 architectural design firms in the country today and as many contractors. From our brief investigation, many of these firms specify tube for

very special applications—usually where aesthetics are a prime concern—but none specifies very much of the structural tubing compared with the structural market at large. In other words, the use per specifier tends to be uniform rather than concentrated. Therefore, it will be very time consuming and costly to inform the specifiers of the virtues of tube other than in its current markets.

The structural tube industry today—to the best of our knowledge—has no design information for the use of its products comparable to that furnished by AISC. With the details of sizes, weights, spans, and most importantly, connections specified in the AISC manual, the designer can readily extract not only the size member, but also the detail connections for virtually any application. Such detail is totally missing in the tube market.

Designers wish to minimize their design time and cost and since most rarely repeat a design, there is no incentive for them to understand a new shape such as structural tube for one job. Some have standardized details for tubes used as handrails, columns, braces, and the like, but the rate at which new standards are created by the architectural profession will be very slow, especially for a material that is slightly more expensive per pound and even more costly per structural unit strength than the existing shapes.

Some designers are looking for high-strength tubing, some for conventional strength, and we believe it unlikely that it would be worthwhile producing inventory and specifying a number of different strengths for tube application.

The one basic opportunity for welded tube would be for some manufacturer or fabricator to develop a system around the use of tube, much as Butler and Armco have done for standard metal buildings, or perhaps design a framing system for school buildings, or the like. Such a design would have to be complete with fabricating details, cost analyses, and the like. We doubt that the incentive exists today for anyone outside the tube industry to undertake such develop-

ment and we question whether the present structural tube industry stands to benefit from its own development of such systems.

We conclude, therefore, that short of a major investment by a tube producer or an industry group, structural tubing will continue to be used by the architects, but growth in this market will follow building activity. While Regal could promote more tube to this industry, we believe more fruitful areas exist for application development.

PLAINTIFF'S EXHIBIT 66

COPPERWELD STEEL COMPANY

February 19, 1973

Mr. D. O. Yoder, President
The Yoder Company
5528 Walworth Avenue
Cleveland, Ohio 44102

Dear Mr. Yoder:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972 this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase

agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

/s/ PHILLIP H. SMITH

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBIT 87

THE YODER COMPANY

27 June 1973

Mr. David F. Grohne, President
Independence Tube Corporation
907 Lawn Court
Western Springs, Illinois 60558

Mr. Grohne:

This is a statement of the Yoder Company Guarantee to Independence Tube Corporation.

The Yoder Company warrants that the proposed equipment will be suitable for producing the structural tubing as specified.

We will furnish Independence Tube Corporation with the best structural tube mill available and provide every possible technical assistance including the services of Ben Dolphin for the duration of this project, to help Independence Tube Corporation achieve the desired results. Design criteria for the mill shall be based on agreements reached between Ben Dolphin and Ted Eckhardt of the Yoder Company and yourself.

The equipment will be essentially as described in specifications B-0739 with provisions to allow for any additional or auxiliary equipment that may be required to meet the desired results.

The total price for this equipment is $1,345,000.

TERMS AND CONDITIONS

The equipment is f.o.b. our factory, Cleveland, Ohio.

The attached "Standard Conditions of Sale", dated 3 October 1966, apply to this equipment with the exception of

payment. Terms of payment will be net 30 days from shipment.

All funds equal to the total purchase price shall be placed in escrow or equivalent. Interpretation of equivalent to be left up to the Yoder Company.

DELIVERY

Based on our present operations, delivery of this equipment can be made in approximately 13 months after receipt of full manufacturing information in our plant.

SERVICE

Start-up service by the Yoder Company is included.

We will furnish bolt hole location drawings and electrical stubups as required for Independence Tube Corporation to have the equipment installed.

We will then provide the necessary service and technical assistance to start up the equipment and demonstrate its capabilities with regard to your product requirements.

You may be sure we want to do anything we can to help you.

Sincerely,

THE YODER COMPANY

/s/ JAMES G. NILES

J. G. Niles
Product Manager
Tube Mills

JGN:ah
Encls.

cc: Ted Eckhardt
Yoder Chicago

STANDARD CONDITIONS OF SALE (YODER)

1. ACCEPTANCE: The attached proposal is void unless accepted within thirty days from date hereof and is subject to change without notice. It supersedes all previous quotations and agreements. If accepted by the Purchaser it shall constitute an order but shall not become binding on the part of The Yoder Company, hereinafter called "Company", until it is acknowledged from the Home Office in Cleveland, Ohio.

2. TERMS: Unless special written terms are arranged all quoted prices are f.o.b. cars or trucks at the point of our assembly and are subject to progress payments as follows:

The delivery time specified in the acknowledgement will be divided into five equal periods.

20%— at end of 1st period

20%— at end of 2nd period

20%— at end of 3rd period

20%— at end of 4th period

Balance—Net, thirty days after date of shipment.

No cash discount will be allowed.

If shipments are delayed by the Purchaser, payment shall become due from date when the Company is prepared to make shipment.

Shipment is contingent upon Purchaser's financial condition being at all times satisfactory to the Company.

3. CANCELLATION: Orders once accepted are not subject to cancellation unless on terms which will indemnify the Company against loss.

4. SHIPMENT: Delivery to the Purchaser is at the assembly plants of the Company in Ohio and all claims for shortages or breakage in transit shall be made directly to the carrier. Shipping dates are approximate and date from

receipt of signed contracts and complete manufacturing information at the Home Office of the Company. Company shall not be liable for delays due to strikes or causes beyond its direct control. Receipt of the equipment by the Purchaser upon its delivery shall constitute a waiver of all claims for loss or damage due to delay.

5. TAXES: Quoted prices do not include taxes: Purchaser agrees to pay such taxes as may be imposed upon this transaction.

6. DRAWINGS: All drawings submitted with this proposal are approximate. Detailed or shop working drawings will not be furnished for any part of the equipment offered.

7. SPECIFICATIONS: (A) In the event the specifications and designs for the equipment, or any part thereof, furnished under this order are by Purchaser: (1) Purchaser will save Company harmless from all claims, costs and expenses of any patent infringement claims or proceedings; and (2) Company shall not be responsible for the accuracy or suitability of such design or specifications nor for the performance of any apparatus built in conformity thereto. (B) In the event Purchaser desires changes in specifications furnished by Company, such changes shall be subject to Company's acceptance and any increased cost resulting therefrom shall be paid by Purchaser upon invoice.

8. INSTALLATION AND SERVICE: All apparatus shall be installed by and at the expense of Purchaser, unless otherwise expressly stipulated.

Should purchaser request the use of servicemen not specifically provided for and included in the contract price, additional charges will be payable to Company at our prevailing per diem rates for such services, plus travel and living expenses.

9. TESTING: All material or equipment necessary for special testing at the Company's works shall be furnished by Purchaser without cost to the Company.

10. PATENTS: Except as herein set forth, in case any suit or proceeding alleging patent infringement is threatened or instituted against the Purchaser and is based upon a claim that any apparatus, or any part thereof, furnished under this contract constitutes an infringement of any United States patent issued prior to the date of the Company's proposal, Purchaser agrees that no claim shall be made against Company unless purchaser has notified Company promptly, in writing, of the threat or institution of said suit or proceeding and unless Purchaser gives Company full authority, information, assistance and cooperation in the investigation of all facts and in the preparation and maintenance of any defense. In any such event it is further agreed that Company shall have the following options: (1) Company may defend said suit or proceeding in behalf of Purchaser and pay all damages and costs awarded herein against the Purchaser; or (2) Company may replace said apparatus or part with non-infringing apparatus or part; or (3) Company may procure for the Purchaser the right to continue using said apparatus or part; or (4) Company may remove said apparatus or part and refund to Purchaser the purchase price less 20% thereof for each year or fraction of a year since the date the same was purchased by Purchaser. The foregoing states Company's entire liability for patent infringement of any apparatus or part furnished hereunder, which liability shall cease and terminate five years following the date of purchase.

11. WARRANTY: Except as herein set forth, the Company warrants that the apparatus to be delivered hereunder shall be suitable for performing the work described in the specifications, and shall be free of defects in materials or workmanship under normal use and service. Speed of production or output are matters beyond the control of the Company and no warranty is implied with respect to any such matter, and if set forth in the specifications, shall be treated as an estimate and not as a binding warranty. It shall be the obligation of Purchaser to fully test the apparatus upon its receipt, provided, however, that the Com-

pany shall be notified of and may be represented at all tests that may be made. Our liability hereunder is limited to the repair or replacement of apparatus proving defective within 180 days after date of shipment to Purchaser. Auxiliary items manufactured by others are sold only under such warranty as the maker provides. No other warranty, except of title, shall be implied. We assume no liability for repairs made by others without our consent.

PLAINTIFF'S EXHIBIT 88

THE YODER COMPANY

Subject

INDEPENDENCE TUBE 20 July 73

Jerry—

Here's a memo of my conversation with Grohne today.

PLEASE REPLY TO Signed TED

DATE Signed

RECIPIENT—REPLY AND RETAIN PINK COPY.
DETACH AND RETURN THIS COPY TO SENDER.

INTER-OFFICE CORRESPONDENCE (YODER)

To: Jerry Temple
From: Ted Eckhardt

Date: 27 July 1973
Subject: Independence Tube Corp. Quotation B-0739

Jerry:

Unless something unusual occurs it appears like Grohne is not going to be able to "swing" our proposal.

I talked with him today and was told—

a) He can't provide the bank with the assurance they want so they'll get their money back if they pay us net 30 and the mill doesn't perform as expected.

b) $1,345,000 is too much to swing. (He does have better price offers.)

c) If the ground rules must remain as they are to consider the proposition dead.

TKE:mm

PLAINTIFF'S EXHIBIT 90

COPPERWELD CORPORATION

October 15, 1973

Mr. D. O. Yoder, President
The Yoder Company
5528 Walworth Avenue
Cleveland, Ohio 44102

Dear Mr. Yoder:

I wrote to you on February 19, 1973, concerning the supply of tube welding machinery to Mr. David F. Grohne. We understand that Mr. Grohne is proceeding with his venture, and also note that we received no definitive reply from you to my letter of February 19. I would appreciate receiving a letter from you, either acknowledging that you are supplying tube welding machinery to Mr. Grohne, or affirming that you will not be supplying to him.

Very truly yours,

/s/ PHILLIP H. SMITH

Phillip H. Smith

PHS/pm

Enclosure

cc: Mr. Frank L. Seamans
Eckert, Seamans, Cherin & Mellott

PLAINTIFF'S EXHIBIT 199

AGREEMENT OF SALE
OF REGAL TUBE DIVISION
BETWEEN

LEAR SIEGLER, INC.

and

COPPERWELD STEEL COMPANY

Dated: January 6, 1972

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AGREEMENT OF SALE

THIS AGREEMENT made between COPPERWELD STEEL COMPANY (hereinafter referred to as "Copperweld"), a Pennsylvania corporation, with offices in the Frick Building, Pittsburgh, Pennsylvania 15219, and LEAR SIEGLER, INC. (hereinafter referred to as "LSI"), a Delaware corporation, with offices at 3171 South Bundy Drive, Santa Monica, California 90406.

WITNESSETH:

WHEREAS, Copperweld desires to purchase and LSI desires to sell and transfer to Copperweld the assets and business of LSI's Regal Tube Division (hereinafter referred to as "Regal") on the terms and conditions hereinafter provided;

NOW, THEREFORE, the parties hereto, intending to be legally bound, covenant and agree as follows:

ARTICLE I. ASSETS

Section 1.1: LSI agrees to sell and transfer to Copperweld and Copperweld agrees to purchase all of the assets and business of Regal as the same shall exist on the Closing Date, February 29, 1972, as defined in Article V hereof. Without in any way limiting the generality of the foregoing, the assets and business of Regal to be sold, transferred and purchased hereunder shall include the following:

(a) The name, trade names (if any) and goodwill of Regal.

(b) The leasehold described in that certain lease from Leargo Corp. to LSI, dated June 1, 1969, demising land situate in Bedford Park, Cook County, Illinois, together with LSI's leasehold interest in the buildings, machinery, equipment and other property generally described in Schedule A thereto.

(c) All machinery, equipment, and other physical property of every kind and description owned by LSI and constituting a part of Regal, whether located on the above-mentioned premises or elsewhere.

(d) All inventories of raw materials, work in process, finished goods, and supplies relating to or held for use in the business of Regal, whether located on the leased premises or elsewhere.

(e) All notes and accounts receivable of Regal, arising out of the business or activities of Regal.

(f) All prepaid expenses, to the extent the benefit thereof is transferable.

(g) All rights under contracts pertaining to the business of Regal, including but not limited to contracts of purchase or sale of goods or services, transferable insurance policies, licenses, and leases of real or personal property.

(h) All U.S. and foreign patents, copyrights, and trademarks (if any) held or used by Regal, to the extent of such use.

(i) All know-how, technical information designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal.

(j) All records of Regal, including property records, plant records, production records, engineering records, contract records, personnel records of employees of Regal, and accounting records.

(k) Regal's sales data and records, customer lists, catalogs and brochures.

(l) Cash, including cash on hand and on deposit in bank accounts regularly maintained for Regal.

ARTICLE II. PURCHASE PRICE

Section 2.1: The purchase price shall be computed as follows:

(a) The book value of Regal's assets, less accumulated depreciation and reserves;

(b) Plus $3,000,000, which Copperweld agrees is for goodwill;

(c) Less the book value of Regal's liabilities other than taxes on income and deferred federal income taxes.

Section 2.2: Book values shall be determined by reference to financial statements of Regal ("Closing Financial Statements") prepared as of the Closing Date by Regal in accordance with generally accepted accounting principles applied on a basis consistent with Regal's past practices and audited by Alexander Grant & Co. LSI will permit Haskins & Sells to read the audited financial statements of Regal as of February 29, 1972 and the related report and working papers of Alexander Grant & Co. and to make inquiries of the representatives of Regal and Alexander Grant & Co. with respect thereto and to apply such other auditing procedures as in the opinion of Haskins & Sells are necessary under the circumstances. Subject to the provisions of Section 2.3, the audit report prepared by Alexander Grant & Co. and the Closing Financial Statements covered thereby shall be binding and conclusive on both parties.

Section 2.3: If Haskins & Sells, as a result of their reading of Regal's audited financial statements and the related report and working papers of Alexander Grant & Co. and their inquiries with respect thereto, disagree in any material regard with the determinations made by Alexander Grant & Co., then in the event such disagreement is not resolved by Copperweld and LSI, each item of disagreement and the amount thereof shall promptly be submitted to a third firm of certified public accountants selected by Alexander Grant & Co. and Haskins & Sells to decide such disagreement, and the

decision of such third firm shall be binding upon both parties.

Section 2.4: The auditors shall take care to write down or write off, as appropriate, idle plant and equipment (if any) and obsolete or otherwise unsaleable inventories, all in accordance with generally accepted accounting principles.

Section 2.5: The cost of the audit, including Haskins & Sells participation and the participation, if necessary, of a third firm, shall be shared equally by the parties.

Section 2.6: With respect to the Regal Tube Division, Lear Siegler, Inc. Retirement Trust under which Continental Illinois National Bank & Trust Company is Trustee (the "Plan"), it is understood that LSI is accruing and will continue to accrue, through the Closing Date, amounts payable to the Trustee under the Plan at the rate of 4.84% of payroll in accordance with Regal's practices during the year ended June 30, 1971. The amount so accrued as of February 29, 1972 shall be included as a liability of Regal in the Closing Financial Statements and shall be assumed by Copperweld and paid to the Trustee by Copperweld not later than March 31, 1972. Effective on the Closing Date, such subsidiary or division of Copperweld as shall be the transferee of the Regal assets shall become the "Company" for purposes of the Plan and Copperweld shall hold LSI harmless from any further liability or obligation under the Plan; but Copperweld as successor to LSI shall have all powers and privileges of the "Company" as provided in the Plan. The parties agree to execute, together with the Trustee, such instruments as may be necessary or appropriate for the purpose of carrying into effect the provisions of this Section.

Section 2.7: Regal is following the practice of accruing management bonuses for six individuals who report directly to the president of Regal at the annual rate of 4% of the amount by which earnings before taxes exceed 10% of average invested capital. Such bonus accruals for the eight months ending on the Closing Date shall be included as a

liability of Regal in the Closing Financial Statements and shall be assumed by Copperweld.

ARTICLE III. LIABILITIES

Section 3.1: As of the Closing Date, Copperweld agrees to assume only the following liabilities and obligations of Regal:

(a) The obligations of Regal under the contracts and leases to be transferred to Copperweld under Article I hereof, including Regal's obligation to complete performance of outstanding orders.

(b) Any back charge obligations of Regal for the return of goods shipped prior to the Closing Date. If the amount of such back charges during the year following the closing, expressed as a percentage of gross sales during such year, exceeds by more than one-tenth the amount of such back charges during the year preceding the closing, expressed as a percentage of gross sales during such year, then LSI shall reimburse Copperweld (as an adjustment of the purchase price) for the loss, if any, sustained by Copperweld as a consequence of such excess back charges, after giving effect to the fair value of the goods returned. The amount of such loss, if any, shall be determined in accordance with generally accepted accounting principles by the independent auditors regularly employed by Copperweld.

(c) All liabilities reflected on Regal's Closing Financial Statements except liabilities, including deferred liabilities, for income taxes.

Section 3.2: Copperweld shall not assume any liabilities for breach of warranty in connection with merchandise shipped by Regal prior to the Closing Date, except as provided in Section 3.1(b).

ARTICLE IV. PAYMENT

Section 4.1: LSI hereby acknowledges receipt of $1,000,000 paid by Copperweld at the time of execution of this Agreement. In the event that the sale, transfer and purchase contemplated herein is not consummated, for any reason, the entire $1,000,000 shall be refunded by LSI to Copperweld, without prejudice to the rights of either party to pursue a claim for breach of this Agreement.

Section 4.2: On the Closing Date Copperweld shall pay to LSI in cash, on account of the purchase price, an amount equal to (a) the book value of Regal's assets, less accumulated depreciation and reserves, less (b) the book value of Regal's liabilities other than taxes on income and deferred Federal income taxes, all determined as of January 31, 1972 on the basis of Regal's unaudited financial statements as of that date, less (c) $1,000,000. On the Closing Date Copperweld shall deliver to LSI, as evidence of its obligation to pay the balance of the purchase price, its 15-day promissory note for $3,000,000, non-interest bearing, in fully negotiable form.

Section 4.3: As soon as practicable following completion of the audit provided for in Article II hereof and final determination of the purchase price in accordance with said Article II, Copperweld shall pay to LSI in cash any unpaid portion of the purchase price, or (as the case may be) LSI shall repay to Copperweld in cash and overpayment of the purchase price.

ARTICLE V. CLOSING

Section 5.1: The closing hereunder shall be held at the offices of Regal at 10:00 A.M., Chicago time on February 29, 1972.

Section 5.2: At the closing, all steps shall be taken and documents and instruments delivered which are necessary or desirable to consummate this transaction and transfer the

assets and business of Regal to Copperweld as herein provided.

Section 5.3: Without limiting the generality of the foregoing, LSI shall deliver the following:

(a) A certified copy of a resolution of the Board of Directors of LSI authorizing this Agreement, the transaction contemplated by this Agreement, and the obligations assumed hereunder by LSI.

(b) A certificate of LSI that there has been no material adverse change in the business or assets of Regal from the date of this Agreement to the Closing Date.

(c) A certificate of LSI that the warranties and representations of LSI set forth in this Agreement are true and correct as of the Closing Date.

(d) Executed bills of sale covering all of the property to be transferred hereunder, in suitable form for use in Illinois or such other jurisdiction in which the property covered by the respective bill of sale may be located, transferring all right, title and interest in such property to Copperweld with full guarantees of title in the form employed in the applicable jurisdiction.

(e) Executed assignments of all leases, agreements, indebtedness, patents, trademarks, trade names, transferable policies of insurance, accounts receivable or other rights and interests to be transferred hereunder in suitable form to transfer all right, title and interest to Copperweld.

(f) A written opinion from LSI's regular counsel that LSI is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and that LSI has full power and authority to sell and transfer the assets and business of Regal; that this Agreement has been authorized by appropriate corporate action of LSI; that this Agreement is a valid and existing obligation of LSI in accordance with its

terms; that this Agreement and the consummation of the transaction contemplated hereby does not conflict with the charter or by-laws of LSI; that such counsel has no knowledge that the consummation of the transaction contemplated hereby conflicts with any contract to which LSI is a party, or is contrary to any order of any court to which LSI is subject; and that such counsel has no knowledge of any facts, proceedings, orders, contracts or other matters inconsistent with any of the warranties and representations made by LSI in this Agreement.

Section 5.4: Without limiting the generality of Section 5.2 hereof, Copperweld shall deliver the following at the closing, in addition to the certified copy of the Resolution of its Board of Directors, which has already been delivered:

(a) A certificate that the warranties and representations of Copperweld set forth in this Agreement are true and correct as of the Closing Date.

(b) A written opinion from Copperweld's regular counsel that Copperweld is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Pennsylvania; that this Agreement has been authorized by appropriate corporate action of Copperweld; that this Agreement is a valid and existing obligation of Copperweld in accordance with its terms; that this Agreement and the consummation of the transaction contemplated hereby does not conflict with the charter or by laws of Copperweld; that the consummation of the transaction contemplated by this Agreement is not contrary to any contract of which such counsel has knowledge to which Copperweld is a party, is not contrary to any order of which such counsel has knowledge of any court to which Copperweld is subject and that such counsel has no knowledge of any facts, proceedings, orders, contracts or other matters inconsistent with any of the warranties and representations made by Copperweld in this Agreement.

Section 5.5: Subsequent to the closing hereunder, LSI shall be obligated to take all reasonable steps and execute and deliver to Copperweld appropriate documents and instruments which Copperweld may reasonably desire to effectuate or evidence the transfer of the business and assets of Regal to Copperweld.

Section 5.6: This Agreement shall survive the closing hereunder.

ARTICLE VI. WARRANTIES BY LSI

Section 6.1: LSI makes the warranties, representations and covenants listed below. Such warranties and representations shall be true and correct on the date of this Agreement (if applicable) and on the Closing Date. Such warranties and representations shall continue in effect after and survive the closing hereunder but after the Closing Date shall speak as of the Closing Date.

Section 6.2: LSI is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has full power and authority (corporate and other) to own or lease the property and assets of Regal and conduct the business and activities of Regal as and where such properties are now owned or leased or such business is now conducted.

Section 6.3: From the date of this Agreement to the Closing Date, there has been no change in the financial condition of Regal except for normal changes occurring in the ordinary course of business which have no material adverse effect upon the assets or business of Regal.

Section 6.4: LSI has clear title, free and clear of liens and encumbrances to the assets to be transferred pursuant to Article I hereof, except for the assets leased by it from Leargo Corp. With respect to the latter, LSI warrants that it conveyed clear title, free and clear of all liens and encumbrances to Leargo Corp. and that it has clear title to its leasehold estate fee and clear of liens and encumbrances.

Section 6.5: The notes and accounts receivable of Regal on the Closing Date are valid and subsisting obligations owing to LSI and such receivables, net of reserves expressly shown on the Closing Financial Statements, shall be collectible in full within one year after the Closing Date. Copperweld agrees to make a reasonable effort to collect such receivables. However, if the actual bad debt experience after closing exceeds the reserve provided therefor in the closing balance sheet, LSI agrees to reimburse Copperweld for the difference, in accordance with the terms of Section 11.1 hereof.

Section 6.6: The execution and delivery of this Agreement by LSI and the consummation of the transaction contemplated hereby do not conflict with or violate any contract or agreement to which LSI is a party except as herein provided where various consents may be required, are not contrary to the Articles of Incorporation or By-Laws of LSI and are not contrary to any order of any court to which LSI is subject.

Section 6.7: LSI has no knowledge that LSI or Regal has failed to comply with any law, regulation or order applicable to the businesses, properties and operations of Regal.

Section 6.8: There are no actions, suits or proceedings pending, and LSI has no knowledge of any actions, suits or proceedings threatened, against LSI affecting Regal or any of the properties, assets, businesses or operations of Regal. As of the date of this Agreement, LSI is not, and LSI has no knowledge of Regal being charged with violating or threatened with a charge of violating or under investigation with respect to a possible violation of any provisions of federal, state or local law or administrative rulings or regulations relating to any material aspect of the assets, properties, businesses or operations of Regal or relating to the transaction contemplated by this Agreement.

Section 6.9: LSI has duly filed all federal, state and other tax returns required to be filed by applicable laws and regulations for all periods up to and including the Closing Date and has duly paid all taxes or installments thereof shown by such returns to be due on or before the Closing Date. There are not any deficiencies or delinquencies in any federal, state, foreign and other tax (including interest or penalties) with respect to any taxable period or attributable to any transaction or transactions prior to the Closing Date involving the assets, properties, businesses or operation of Regal.

Section 6.10: The assets and properties and rights to be transferred to Copperweld pursuant to this Agreement are sufficient and adequate to continue to properly and normally conduct after the Closing Date the business and operations conducted by Regal in the same manner as such business and operation of Regal is being conducted on the date of this Agreement and consist of all of the assets and business of Regal.

Section 6.11: LSI has no knowledge of any strikes or labor disputes threatened or pending against Regal of a material nature.

Section 6.12: Any policies of insurance to be transferred to Copperweld hereunder are in full force and effect. All premiums with respect to such policies which became due and owing prior to the Closing Date have been paid in full.

Section 6.13: LSI has full power and authority to sell the assets, business and rights of Regal pursuant to this Agreement. To the extent that any consents, approvals or agreements from any third parties are required to effectuate or accomplish the transfer of any material asset or property to be transferred hereunder, and such consents, approvals or agreements have not been obtained before the Closing Date, LSI will make reasonable efforts to obtain them after the Closing Date, in cooperation with Copperweld. This Agreement, the transaction contemplated by this Agreement and

the obligations assumed by LSI have been duly authorized by appropriate corporate action on the part of the directors of LSI, and upon the execution and delivery of this Agreement, it shall be a valid and binding obligation of LSI in accordance with its terms.

Section 6.14: LSI has not incurred any liability for which Copperweld would be responsible for brokerage fees, finder's fees, agent's commissions or other similar forms of compensation in connection with this Agreement or the transaction contemplated hereby.

Section 6.15: The unaudited financial statements of Regal as of November 30, 1971, copies of which are annexed, are substantially correct and fairly reflect the financial condition and operating results of Regal as indicated thereon, subject to audit adjustments.

ARTICLE VII. COPPERWELD WARRANTIES

Section 7.1: Copperweld makes the following warranties, representations and covenants set forth in Section 7.2 through Section 7.4. Such warranties and representations shall be true and correct on the date of this Agreement and on the Closing Date. Such warranties and representations shall continue in effect after and survive the closing hereunder but after the Closing Date shall speak as of the Closing Date.

Section 7.2: Copperweld is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Pennsylvania. Copperweld has full power and authority to enter into this Agreement and consummate the transaction contemplated by this Agreement. This Agreement, the transaction contemplated by this Agreement, and the obligations assumed by Copperweld hereunder have been duly authorized by appropriate corporate actions on the part of Copperweld's directors and upon the execution and delivery of this Agreement, it shall be a valid and

binding obligation of Copperweld in accordance with its terms.

Section 7.3: The execution and delivery of this Agreement and the consummation of the transaction contemplated hereby do not conflict with or violate any contract or agreement to which Copperweld is a party, are not contrary to the Articles of Incorporation or By-Laws of Copperweld and are not contrary to any order by any court to which Copperweld is subject.

Section 7.4: Copperweld has not incurred any liability for which LSI would be responsible for brokerage fees, finder's fees, agent's commissions or other similar forms of compensation in connection with this Agreement or any transaction contemplated hereby.

ARTICLE VIII. TAXES

Section 8.1: LSI shall be responsible for all foreign, federal, state and local net income taxes applicable to the properties, business and/or operation of Regal for any period prior to the Closing Date, and any such net income taxes as a result of the transaction contemplated by this Agreement.

Section 8.2: LSI shall indemnify and hold Copperweld harmless from any claim or liability for any tax which LSI is obligated to pay pursuant to Section 8.1 and shall pay all expenses incurred by Copperweld in defending against any such claim for taxes, including reasonable attorneys' fees.

Section 8.3: Any sales, transfer, use or similar taxes (including gross income taxes in the nature of sales taxes) levied upon this Agreement or the transaction and transfers contemplated by this Agreement shall be shared equally by the parties.

Section 8.4: Liability for property taxes and similar assessments shall be prorated as of the Closing Date.

ARTICLE IX. OBLIGATIONS OF LSI UNTIL CLOSING

Section 9.1 Except for steps or actions taken pursuant to prior written consent of Copperweld, LSI, from the date of this Agreement until the Closing Date, shall conduct the business and operations of Regal in accordance with the same business practices previously followed by it and during that period shall:

(a) Conduct its business only in the ordinary and usual course and shall not make any capital expenditure or commitment for capital expenditure.

(b) Refrain from transferring any of its assets or properties except in the ordinary and usual course of business.

(c) Refrain from entering into any leases, licenses, contracts or other commitments involving actual or potential liability in excess of $30,000, and shall refrain from entering into any leases, licenses, contracts or other commitments involving actual or potential liability of less than $30,000 other than in the ordinary and usual course of business.

(d) Refrain from increasing the compensation paid or payable to any of the employees, agents or consultants of Regal, except in accordance with its present written commitments and in accordance with usual and customary periodic reviews and adjustments.

(e) Refrain from paying or declaring any bonuses to any of the employees, agents or consultants of Regal except in accordance with past practice.

(f) Continue to meet its contractual obligations relating to Regal and to pay its obligations as they mature in the ordinary course of business.

(g) Use its best efforts to maintain the business of Regal intact, to keep available the services of its present employees, and to preserve the good relations of its

suppliers, customers and others with whom it has business relations.

(h) Maintain existing fire and other casualty insurance policies on the assets of Regal.

Section 9.2: Subsequent to the execution of this Agreement and prior to the Closing Date, LSI shall furnish to Copperweld all information available to LSI concerning the affairs of Regal and copies of documents as Copperweld may reasonably request relating to Regal and its properties, plants, books, records and files, and shall permit Copperweld and any persons designated by Copperweld full and free access to the properties, records and books of account of Regal for any and all reasonable purposes.

ARTICLE X. CONDITIONS OF CLOSING

Section 10.1: The obligations of Copperweld under this Agreement are subject to the satisfaction of all of the following conditions by the Closing Date, any of which may be waived by Copperweld:

(a) All representations and warranties of LSI contained in this Agreement shall be true and correct as of the Closing Date.

(b) LSI shall have fully performed all commitments hereunder up to the Closing Date and shall tender and deliver the required documents, instruments, certificates and opinions at the closing as set forth in Section 5.3.

(c) There shall not be any material adverse change in the business and affairs of Regal from the date of this Agreement to the Closing Date, and, during that period, Regal shall not have suffered any material loss by fire or other casualty.

(d) LSI shall have obtained the consent of Leargo Corp. and the mortgagee to the assignment of its lease (referred to in Section 1.1) to Copperweld; and the leasehold estate created by said lease shall not be subject

to any defects or encumbrances, other than the mortgage and assignment in favor of New York Life Insurance Company, which might reasonably be expected to materially interfere with the uninterrupted enjoyment thereof by Copperweld.

(e) All other consents required from any corporation, person, party or other entity in order to effectuate the transfers called for under this Agreement in accordance with this Agreement shall have been obtained or otherwise provided for as herein or otherwise agreed to.

Section 10.2: If any of the conditions set forth in Section 10.1 have not been satisfied by the Closing Date, Copperweld at its option exercised in writing, may:

(a) rescind this Agreement with each party to the Agreement bearing its own expense; or

(b) agree to the closing pursuant to this Agreement notwithstanding such failure, in which case LSI shall, at its own expense, exercise its best efforts to remedy the failure as soon as possible after closing; or

(c) agree to the closing pursuant to this Agreement on such further terms and conditions as the parties hereto may agree to in writing.

Section 10.3: The obligations of LSI hereunder are subject to the satisfaction of the following conditions prior to the closing, any of which may be waived by LSI:

(a) All representations and warranties made in this Agreement by Copperweld shall be true and correct as of the Closing Date, and all covenants to be performed by Copperweld shall have been so performed.

(b) Copperweld shall tender and deliver the required certificate and opinion at the closing as set forth in Section 5.4.

(c) The condition set forth in Section 10.1(d) shall have been satisfied. LSI agrees to use its best efforts to

obtain the consent of Leargo Corp. and the mortgagee. If such consent requires that LSI shall remain obligated or responsible for the performance of the lessee's obligation under the Leargo lease and related instruments, then Copperweld agrees to execute and deliver to LSI an instrument (i) assuming and agreeing to perform such obligations and indemnifying LSI against any failure of performance thereof, and (ii) granting to LSI, in the event of a default by Copperweld, substantially the same remedies as the lessor under said lease would have in the event of a default by the lessee thereunder.

ARTICLE XI. INDEMNITY

Section 11.1: LSI shall indemnify Copperweld and hold Copperweld harmless from and in respect of any and all loss, liability, cost or expense (including reasonable fees and expenses of counsel) accruing from or resulting by reason of any breach of any warranty, representation, commitment or promise contained in this Agreement made or to be performed by LSI. Any knowledge or notice which Copperweld may have on or prior to the Closing Date of any breach of any such warranty, representation, commitment or promise shall not limit or reduce to any extent whatsoever the obligations of LSI under the first sentence of this Section 11.1. Any payments made by or on behalf of LSI pursuant to its agreement to indemnify under this Section 11.1 shall be made as a reduction of the purchase price for the assets, property and business transferred to Copperweld pursuant to this Agreement.

Section 11.2: Copperweld shall indemnify LSI and hold it harmless from and in respect of any and all loss, liability, cost or expense (including reasonable fees and expenses of counsel) accruing from or resulting by reason of any breach of any warranty, representation, commitment or promise contained in this Agreement made or to be performed by Copperweld. Any knowledge or notice which LSI may have on or prior to the Closing Date of any breach of any such

warranty, representation, commitment or promise shall not limit or reduce to any extent whatsoever the obligations of Copperweld under the first sentence of this Section 11.2.

ARTICLE XII. MISCELLANEOUS

Section 12.1: LSI agrees not to engage in the business conducted by Regal, nor to permit any subsidiary over which it has control to engage in such business, anywhere in the United States, for a period of five years following the Closing Date. This Section shall not be applicable to any present activity of LSI or any of its subsidiaries.

Section 12.2: Each party hereto shall bear its own costs and expenses in connectiion with this Agreement and the transaction contemplated by this Agreement.

Section 12.3: Legal title, equitable title and risk of loss with respect to the property and rights to be transferred hereunder shall not pass to Copperweld until the property or right is transferred at the closing hereunder.

Section 12.4: All notices required or permitted hereunder shall be in writing and shall be deemed to be properly given when personally delivered to the party entitled to receive the notice or when sent by certified or registered mail, postage prepaid, properly addressed to the party entitled to receive such notice at the address stated below:

LSI Attn: Mr. Robert L. Purcell
Chairman of the Board
Lear Siegler, Inc.
3171 South Bundy Drive
Santa Monica, Calif. 90406

Copperweld Attn: Mr. Phillip H. Smith
President
Copperweld Steel Company
Frick Building
Pittsburgh, Pennsylvania 15219

Section 12.5: This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. Copperweld shall not assign this Agreement to any party without the prior written consent of LSI.

Section 12.6: This Agreement shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof and shall supersede all previous negotiations, commitments and writings. This Agreement may not be released, discharged, abandoned, changed or modified in any manner, except by an instrument in writing signed on behalf of each of the parties hereto by their duly authorized officers or representatives. The failure of any party hereto to enforce at any time any of the provisions of this Agreement shall in no way be construed to be a waiver of any such provision, nor in any way to affect the validity of this Agreement or any part thereof or the right of any party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.

Section 12.7: The captions appearing in this Agreement are inserted only as a matter of convenience and as a reference and in no way define, limit or describe the scope or intent of this Agreement or any of the provisions hereof.

Section 12.8 This Agreement shall be construed and the rights of the parties hereunder shall be governed by the laws of the Commonwealth of Pennsylvania.

Section 12.9: Copperweld may substitute a subsidary as transferee of the assets of Regal by supplying the name thereof to LSI within a reasonable time prior to the closing.

IN WITNESS WHEREOF, each of the parties hereto has duly executed this Agreement in duplicate this 6th day of January, 1972.

LEAR SIEGLER, INC.

By: /s/ ROBERT L. PURCELL

COPPERWELD STEEL COMPANY

By: /s/ P. H. SMITH

	1971 NOVEMBER
CURRENT ASSETS	
Cash	$ (8,759)
Marketable Securities	
Receivables	
Commercial and other	1,251,433
Government	
	1,251,433
Allowances	4,766
	1,246,667
Inventories	
Raw materials	2,085,754
Work in process	
Finished goods	1,279,762
	3,365,516
Costs on defense contracts	
Less progress payments	
Current portion of real estate held for sale	
Prepaid expenses	86,488
Total current assets	4,689,912
REAL ESTATE HELD FOR SALE —Less Current Portion	
PROPERTY PLANT AND EQUIPMENT AT COST	
Land	
Buildings, improvements, machinery and equipment	5,245,061
Less depreciation and amortization	1,812,835
	3,432,226
OTHER ASSETS	
Investments—affiliates	
Patents—net	
Long-term receivables	
Sundry	
	$8,122,138
Working capital	2,983,854
Current ratio	2.7
Day's sales in A/R	30.3
Inventory turnover	4.0
Return on investment	21.7

	1971 NOVEMBER
CURRENT LIABILITIES	
Notes payable—banks & others	$
Current maturities of long-term debt	
Accounts payable	
Trade	1,109,085
Other	7,405
Dividends payable	
Income taxes (State & Federal)	335,886
Profit sharing contribution	
Company	
Employees	
Accrued liabilities	
Salaries, wages and commissions	131,799
Taxes (other than income taxes)	93,703
Other	28,180
Total current liabilities	1,706,058
DEFERRED LIABILITIES	187,538
LONG TERM DEBT	
5½%—15 year note	
7.95% note due 1988	
Mortgage and other notes payable	
Less current maturities	
INTERCOMPANY ACCOUNTS	
Amounts due to (from) affiliates	
Amounts due to (from) Corporate Office	
Amounts due to (from) unconsol. subs.	
INVESTMENT ACCOUNT—Corporate Office	5,860,112
MINORITY INTEREST IN CONSOL. SUBS	
STOCKHOLDERS' EQUITY	
Preferred stock	
Common stock	
Additional capital	
Retained earnings	
Current year's retained earnings	368,430
	6,228,542
Less: Treasury Stock	
	$8,122,100

COMPARATIVE STATEMENT OF EARNINGS

November 30, 1971

	1972	
NET SALES		
Commercial/Industrial	$6,271,802	100.0%
Government		%
Total net sales	6,271,802	100.0%
COST OF GOODS SOLD	5,025,648	80.1%
Gross profit	1,246,154	19.9%
OPERATING EXPENSES		
Advertising	1,613	.1%
Selling	169,713	2.7%
Administrative	194,006	3.0%
Group Office expense	23,046	.4%
Corporate Office expense	160,457	2.6%
	548,835	8.8%
Operating profit	697,319	11.1%
OTHER INCOME	910	%
OTHER DEDUCTIONS	(10,290)	(.2)%
MINORITY INTEREST		%
Earnings (before taxes)	708,519	11.3%
INCOME TAXES	340,089	5.4%
NET EARNINGS	$ 368,430	5.9%
Included above in costs and expenses:		
Depreciation and amortization	$ 143,775	2.3%
Interest expense		%
Profit sharing expense		%
Inter-divisional sales		%
State and local taxes based on income	28,200	.4%
Government backlog		
Number of employees	114	

PLAINTIFF'S EXHIBIT 214

COPPERWELD STEEL COMPANY

February 19, 1973

Mr. Kenneth K. Chalmers, Vice President
Continental Illinois National Bank & Trust Company
231 South LaSalle Street
Chicago, Illinois 60690

Dear Mr. Chalmers:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our pruchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

/s/ PHILLIP H. SMITH

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBIT 232

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

January 26, 1973

Re: Regal Tube Company [Handwritten note: Independence Tube/Grohne File]

Mr. Barton Beek
O'Melveny & Myers
611 West Sixth Street
Los Angeles, California 90017

Dear Bart:

First of all, Bart, I want to say it is very pleasant to be using your name again and also to say that you will be interested that my son Dick is now in Los Angeles where he is working in the legal department of North American Rockwell. They are living in Palos Verdes.

Copperweld has learned that David F. Grohne is organizing a company called Independence Tube Company which will operate in competition with Regal. Copperweld is naturally going to follow this very closely because there is a non-compete as between Lear-Siegler and Copperweld and because the know-how and secret process information of Regal was transferred by Lear-Siegler to Copperweld.

I am sure that Lear-Siegler would want the spirit of the Copperweld deal to be kept inviolate so it occurred to me to ask whether you would care to make any inquiry at Lear-Siegler to see what information could be obtained regarding the intentions of Mr. Grohne. I assume that Lear-Siegler has no interest in Mr. Grohne's new venture.

I will appreciate it if you will make some inquiries on what Lear-Siegler knows about this and write me regarding it.

I regard our negotiation as one of the most pleasant ones I have ever had and I hope we will sometime meet again.

Best regards,

/s/ FRANK L. SEAMANS

FLS/GS

bcc: Mr. Phillip H. Smith
Mr. D. H. Deichmann
Mr. Bedford F. Foster

PLAINTIFF'S EXHIBIT 233

O'MELVENY & MYERS

March 20th, 1973

Frank L. Seamans, Esq.
Messrs. Eckert, Seamans, Cherin
& Mellott
10th Floor, Porter Buiding
Sixth Avenue and Grant Street
Pittsburgh, Pennsylvania 15219

Dear Frank:

Please excuse my long delay in giving you a written reply to your letter of January 26, 1973 regarding Dave Grohne.

It was nice to have a chance to talk to you on the telephone while you were here in the Los Angeles area about two weeks ago. This letter will confirm our conversation to the effect that neither LSI nor any of its senior officers (nor, to their knowledge, anyone else connected with LSI) has any interest of any nature whatsoever in Mr. Grohne's new venture.

We received inquiries from Bell, Boyd, Lloyd, Haddad & Burns of Chicago, who are representing Mr. Grohne, as to whether we had any information about the position Copperweld was taking. We have responded that we have no such information, but we have sent them a copy of the Agreement of Sale of Regal Tube Division between LSI and Copperweld.

I think you understand that the separation between LSI and Mr. Grohne was not altogether a happy one, and there is really no way that Lear Siegler can have any impact on Mr. Grohne's activities or on any possible disputes between him and your client.

Cordially,

Barton Beek
of O'Melveny & Myers

BB:zr
BCC: Messrs. Purcell and Campion

PLAINTIFF'S EXHIBIT 236

February 21, 1973

Mr. Robert Deacon, General Manager
Clearing Industrial District
Division of Kaiser Aetna
Suite 3940
One First National Plaza
Chicago, Illinois 60670

Dear Mr. Deacon:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15222

PLAINTIFF'S EXHIBIT 347

REGAL TUBE COMPANY

September 19, 1974

Mr. J. R. Scott
Vice President-Sales, Chicago District
United States Steel Corporation
Post Office Box 1283
208 South LaSalle Street
Chicago, Illinois 60690

Dear Mr. Scott:

Please find attached copies of both shipping notice and invoice to Independence Tube that were received at Regal Tube in error on September 17, 1974. Bill Gustafson of your office has been contacted and advised us of proper disposition.

It is a source of great concern to Regal Tube, which has had a long association with U.S. Steel, to suffer reduced allocations only to find that Independence Tube, which has never established an allocation, is receiving shipments of steel from your Gary works.

Bill Gustafson's letter of September 9, 1974 to Bedford Foster details the problems that U.S. Steel has encountered in the Gary area but reaffirms U.S. Steel's interest in participating in a larger share of Regal's known growing market potential stating, "The road will not be smooth but we are confident we will become a still better supplier to the Midwest Industry and we hope Regal Tube." As of August 31, 1974, U.S. Steel's delinquent tonnage to Regal Tube was 9,823 tons. How can U.S. Steel increase its participation as a supplier to Regal Tube by shipping to companies who have not established an allocation?

Very truly yours,
/s/ HERMAN H. PHILIPP
Herman H. Philipp
Vice President and General Manager

HHP: jg
cc: Mr. P. H. Smith
Mr. B. F. Foster, Jr.

PLAINTIFF'S EXHIBIT 393

COPPERWELD STEEL COMPANY

January 16, 1973

Mr. Frank L. Seamans
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

Dear Zeke:

Re: Independence Tube—Regal Tube

Dick Deichmann was advised last week that Mr. David Grohne, former president of Regal Tube Company, is going into business, forming a new company, The Independence Tube Company.

Article XII, Section 12.1, Page 37, of the Close Papers, prohibits LSI from entering the tubing business for a period of five years. No reference is made, of course, to Mr. Grohne. However, as I reflect on this matter, I wonder whether it was ever the intention of Mr. Grohne to stay with LSI, as he indicated. We know he did not sell his home in Chicago, and returned to Chicago on LSI's behalf to act as a coordinator on imported steels, after spending several months at LSI's headquarters in Santa Monica. Grohne, of course, is highly knowledgeable of all of our internal affairs at Regal, and also our customer lists. A combination of Grohne and Nostrand, who left LSI to join Welded Tube, could create a problem for Regal if they chose to use their knowledge in an unethical fashion.

By copy of this letter I am asking Dick to get up-to-date financial information on the formation of Independence Tube, and I think we should track this situation carefully.

Sincerely,

Phillip H. Smith

PHS/pm
cc: Mr. D. H. Deichmann
Mr. Bedford F. Foster

PLAINTIFF'S EXHIBIT 394

February 1, 1973

Re: Regal—Grohne

Phillip H. Smith
D. H. Deichmann
Bedford F. Foster
C. A. Wilson

Art Wilson and I believe that the "non-compete" cannot be used against Grohne because he did not sign it, but that Lear-Siegler sold to Copperweld "All know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

Accordingly, if Grohne uses or threatens to use any of the information or material in the above quotation we will have grounds on which to file suit to stop him.

The difficulty will be in proving that he is using some of the proprietary information or material which now belongs to Copperweld.

In any event, it would be well for us to let it be known that we are going to follow his activities like a hawk and will file suit to enjoin him if he uses any of the information or materials Copperweld purchased from Lear-Siegler.

Probably information about customers is the most significant here.

I have not yet had a reply from Barton Beek and I will be interested in what information your investigator turns up.

F. L. S.

FLS:GS

PLAINTIFF'S EXHIBIT 395

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

February 2, 1973

Mr. Phillip H. Smith, President
Copperweld Steel Company
322 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Phil:

Enclosed is a draft of a letter to Mr. David F. Grohne and a draft of a letter to financing sources which Art Wilson and I thought you might consider. Art will discuss this with you at any time you wish.

Best regards,

/s/ ZEKE

FLS:pak

Enclosures

Draft of 2/2/73

Dear Mr. Grohne:

We understand that you are considering engaging in the tubing business in competition with Regal Tube Company which, as you know, we purchased from Lear Siegler last February.

We want you to know that among the items we purchased from Lear Siegler was:

> "All know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

When we purchased Regal Tube from Lear Siegler, we understood that you would either remain at Regal Tube under our ownership or work with Lear Siegler. Nothing was said about the possibility of your entering into a competing business.

You should also know that the purchase agreement contains the following provision:

> "LSI agrees not to engage in the business conducted by Regal, nor to permit any subsidiary over which it has control to engage in such business, anywhere in the United States, for a period of five years following the Closing Date. This Section shall not be applicable to any present activity of LSI or any of its subsidiaries."

We are writing you to advise that if you do in fact engage in the manufacture and sale of tubing products in competition with Regal Tube, we will take any and all steps which are necessary, including the institution of suit, to protect our rights under the terms of the purchase agreement and to protect the "know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal", which we purchased from Lear Siegler.

Very truly yours,

PLAINTIFF'S EXHIBIT 408

February 19, 1973

Mr. C. E. Robinson
1280 North Port Drive
Siesta Key
Sarasota, Florida

Dear Mr. Robinson:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBIT 411

[Handwritten note: read to B. F. Foster at 5:14 p., 11/14/73 and put in mail to Mr. Foster—Jab]

Copperweld Pgh
VU Infomaster, 1-0296330313 11/14/75
TLK Yoderco Clv
01 Cleveland Ohio Nov. 14
TWX 7106642022 Copperweld Pgh
Mr. Phillip H. Smith, Chairman & President

Rumors persist that Ohio Seamless Division of Copperweld is about to place major orders for two pipe mills and associated equipment, including draw benches with at least one of the systems to be located in Iowa, presumably to serve the farm equipment marketplace.

We are in the awkward position of having offered to participate in such programs and continue to receive reports that the vendors considered for those important capital additions to your corporate productivity are Wean McKay and Abbey-Etna.

I'd like to suggest that the correspondence received from your company over your signature in December and October of 1973 regarding a disagreement between your company and that of Independence Tube and a Mr. David Grohne involved very seriously the Yoder Company. It was our pleasure to be able to report to you in December of 1973 that we at the Yoder Company were not participating with Mr. Grohne in the corporation to compete directly with your Copperweld-Regal Tube operations.

Your company certainly pulled no punches in alerting the Yoder Company to possible litigation resulting from our working with Mr. Grohne on that project. That correspondence directly affected our relationship with that program.

We are now curious and concerned about the apparent dedication on the part of your company to the possible contract agreement with Abbey-Etna who was, indeed, the company who supplied the equipment to Mr. Grohne, which is in and operating now.

We do not expect special treatment in this matter but we want the opportunity to participate with your company in your major acquisition. May we meet with you to discuss the matter and to determine whether Copperweld should, indeed, consider seriously inclusion of the Yoder Company's capabilities in your important manufacturing plans.

G. L. Temple, Vice President
Sales & Marketing
Yoderco

PLAINTIFF'S EXHIBIT 430

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

May 11, 1973

Re: Grohne

Mr. Phillip H. Smith
Copperweld Corporation
322 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Phil:

Re your letter of April 23, 1973, I would keep this under surveillance so that we know when we can make our contention that Grohne is utilizing information and know-how which we purchased from Lear Siegler.

Very truly yours,

/s/ ZEKE

FLS:GS

COPPERWELD STEEL COMPANY

April 23, 1973

Mr. F. L. Seamans
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

Dear Zeke:

Re: David F. Grohne

I received a call Thursday from Hale Prietsch that they have essentially completed their study. Mr. C. E. Robinson is the financial partner for Independence Tube, and shows as the only other director other than Mr. and Mrs. Grohne. Robinson's five year non-compete agreement with LSI ran out Wednesday.

It would appear to me that there is little we could do to block Robinson going into business. I still remain convinced, however, that there is plenty we can do to block Grohne. Recognizing that Robinson is now 73 years old, I also wonder if he really wants to undertake a fight at this time.

Sincerely,

/s/ PHIL

Phillip H. Smith

PHS/pm

Zeke: We wrote Mr. Robinson.

Phil

PLAINTIFF'S EXHIBIT 443

February 19, 1973

Mr. R. J. Wean, Jr., President
Wean-United, Inc.
3 Gateway Center
Pittsburgh, Pennsylvania 15222

Dear Mr. Wean:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBIT 446

COPPERWELD STEEL COMPANY

February 19, 1973

Mr. J. J. Mullen, President
Abbey Etna Machine Company
3400 East Indiana Avenue
Perrysburg, Ohio 43551

Dear Mr. Mullen:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase

agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

/s/ PHILLIP H. SMITH

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBIT 447

ABBEY ETNA MACHINE COMPANY

March 3, 1973

Copperweld Steel Company
Executive Offices
Frick Building
Pittsburgh, Pennsylvania 15219

Attention: Mr. Phillip H. Smith
President

Gentlemen

We wish to acknowledge receipt of your letter dated February 19, 1973 relating to Mr. David F. Grohne and The Independence Tube Company.

Abbey Etna Machine Company, among other tube mill manufacturers has offered The Independence Tube Company, represented by Mr. David F. Grohne, a tube mill for the manufacture of structural products. Our offer did not include the supply of any capital or medium term financing for the purchase of this equipment. It is the corporate policy of The Abbey Etna Machine Company not to participate with its U.S. customers as a share holder or lender, but has on occasion provided commercial financing, i.e., Commercial Credit Corporation or The C.I.T. Corporation, to assist its customers in their purchase of our products.

We sincerely hope that the above will clarify our position on this subject.

Very truly yours,

ABBEY ETNA MACHINE
COMPANY

/s/ JOHN J. MULLEN

John J. Mullen
President

JJM/

PLAINTIFF'S EXHIBIT 448

REGAL TUBE COMPANY

November 9, 1973

Mr. Phillip H. Smith
President and Chairman
Copperweld Steel Company
322 Frick Building
Pittsburgh, Pennsylvania
15219

[Handwritten note: For Action By
Mr. F. L. Seamans
Reviewed 11-12-73
a) FLS to write A-E and ask for confirmation
b) Advise A-E that COS will protect its interest against both Grohne and A-E.
PHS 11-13-73]

Dear Phil:

I have learned from an unimpeachable source that Dave Grohne has purchased a weld mill. The mill is an Abbey Etna 7X unit, which will produce a 6" square (7⅝" O.D.) to .280" wall. This, of course, covers a most important part of our size range.

The unit is being built by the Abbey Etna Machine Co., Inc. of Perrysburg, Ohio, which is the company that built our newest mill. Mr. Jack Mullins, President of Abbey Etna, assured me in April or May of this year that they would certainly not be doing business with Mr. Grohne. This was shortly after receiving your notification.

The mill was ordered in July of this year, and is scheduled for March 1974 delivery (this seems rather fast).

As soon as I have more information on the subject, I will let you know.

Sincerely,

/s/ BEDFORD

Bedford F. Foster, Jr.

BFFjg

PLAINTIFF'S EXHIBIT 449

Re: David F. Grohne
Independence Tube Company

Dear Mr. Mullins:

By letter of February 19, 1973, we advised you that if Mr. Grohne entered the structural tubing market in competition with Regal Tube which we bought from Lear Siegler, we would take every legal means to be sure that he was not using any of the know-how technical information or trade secrets which he had learned while at Regal and which we had purchased from Lear Siegler when we acquired Regal.

Mr. Grohne is of course free to enter the structural tubing market or any other business so long as he does not violate our purchase agreement with Lear Siegler or utilize any of the know-how technical information or trade secrets which now belong to us.

Inasmuch as we have been told that you are considering selling equipment to Mr. Grohne, we thought you should be apprised that our attitude remains the same as expressed in our letter of February 19, 1973.

Very truly yours,

ECKERT, SEAMAN'S, CHERIN & MELLOTT
Attorneys At Law

November 19, 1973

Re: Grohne

Mr. Phillip H. Smith
Copperweld Corporation
322 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Phil:

We must be careful not to open ourselves up to an anti-trust suit by Grohne that we have harassed potential financial and equipment suppliers from doing business with him, thus restricting competition.

I think something like the enclosed would be all right for a letter to Abbey Etna.

Very truly yours,

/s/ Zeke

FLS:GS
Enclosure

cc: Bennett Sack (w/enclosures)

PLAINTIFF'S EXHIBIT 478

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

June 7, 1973

Re: Grohne

Mr. Phillip H. Smith
Copperweld Corporation
322 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Phil:

Under our theory we would enjoin him from using the trade secrets sold by Lear Siegler to Copperweld. Therefore, there is not much we can do until he starts to operate or solicit customers, other than make known our intentions which has already been done. He should therefore be kept under continued surveillance and once he starts to operate or solicit business we should pounce on him.

I have never talked to his lawyers in Chicago and I do not see much future in doing so, do you?

Very truly yours,

/s/ ZEKE

FLS:GS

PLAINTIFF'S EXHIBIT 479

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

June 13, 1973

Bedford F. Foster
Regal Tube Company
7401 South Linder
Chicago, Ill. 60633

Re: Grohne

Dear Bedford:

Neither Phil nor I can see any reason for me to talk with Grohne's lawyers. I would only be asked to make concessions. Do you know of any reason?

I would keep my ear to the ground on this matter, however, and if he starts to solicit customers or starts to employee any manufacturing technique which we purchased from Lear-Siegler, we should be on him like a hawk.

Best Regards,

/s/ Zeke

Frank L. Seamans

FLS:plg
cc: Phillip H. Smith

PLAINTIFF'S EXHIBIT 481

ECKERT, SEAMANS, CHERIN & MELLOTT
Attorneys At Law

December 13, 1973

Re: Regal—Grohne

Mr. Phillip H. Smith
Copperweld Corporation
322 Frick Building
Pittsburgh, Pennsylvania 15219

Dear Phil:

Enclosed is a memorandum prepared by Pete Baggerman reviewing this situation. Enclosed also is that portion of the Opinion in *Telex* v. *I.B.M.* dealing with the pirating by Telex of I.B.M. employees.

My own judgment is that we would probably not succeed if we would institute an action to enjoin Grohne now from (a) stealing our employees, (b) entering into competition with us, or (c) both.

If he should take further employees and/or do something to utilize the know-how or secret processes we bought from Lear Siegler, our case would be better.

Instituting an action now, even though unsuccessful, might have some good effects but I am afraid we would be met by a counterclaim that would pose serious problems.

After you have had a chance to look at this material, please call me and we will discuss it.

Grohne did not have an employment contract with Lear Siegler.

Very truly yours,

/s/ ZEKE

FLS:GS
Enclosures 2

PLAINTIFF'S EXHIBIT 579

AFFIDAVIT

STATE OF OHIO,
COUNTY OF RICHLAND, SS:

The undersigned Bedford F. Foster, Jr. being first duly sworn, does hereby state that he is Vice President and General Manager of Ohio Steel Tube Company, an Ohio Corporation, with its principal place of business in Shelby, Ohio, and a wholly owned subsidiary of Copperweld Corporation; that in such capacity he has sole responsibility and authority over the entire operations of said Ohio Steel Tube Company, including but not limited to sales, engineering, production, purchasing of raw materials, research and development of new products and negotiation of labor agreements; and that generally in all material respects the operations of Ohio Steel Tube Company are controlled in Shelby, Ohio. Further affiant states not.

/s/ BEDFORD F. FOSTER, JR.

Bedford F. Foster, Jr.
Vice President and General Manager
Ohio Steel Tube Company

Sworn to and subscribed in my presence this 16th day of Sept. 1, 1975.

ROBERT E. JIMISON
Notary Public, Riceland County, Ohio
My Commission Expires March 16, 1980

/s/ ROBERT E. JIMISON
Notary Public

PLAINTIFF'S EXHIBIT 654

April 22, 1972

Continental Illinois National Bank
and Trust Company of Chicago
231 South La Salle Street
Chicago, Illinois 60690

Attention: Mr. Donald B. Baer
Vice President

Gentlemen:

Enclosed is our presentation to you outlining the concept of our company and an explanation of the market size and growth prospects, the competitive situation, our manufacturing process, and our financial projections.

A significant opportunity exists in the structural tubing market, and it is imperative that we proceed immediately to capitalize on it before it is discovered and seized by another firm.

We request your approval of a five year term loan in the amount of $1,900,000 to be used for the purpose of financing the machinery and equipment required for our structural tube manufacturing company. 50% of the loan is to be repaid in installments during the five-year period with the remaining 50% due at the expiration of the five-year period.

It is necessary that we have a firm commitment from you as soon as possible, since this commitment will be needed for purposes of assuring the tube mill manufacturer that funds will be available for payment to him at such time as the equipment is operating on an acceptable production basis. The commitment should provide for the loan between July 1, 1973 and December 31, 1973.

We further request your approval of a line of credit not to exceed the lesser of $1,000,000, or 60% of the aggregate inventory and accounts receivable. This line of credit will be

needed from July 1, 1973 until the due date of the term loan. We will also need a provision to allow us to utilize this credit during the period from July 1, 1973 to the take down of the term loan for purposes of making required payments to equipment suppliers prior to the mill acceptance.

Very truly yours,

/s/ DAVID F. GROHNE

Enclosure

PLAINTIFF'S EXHIBIT 718

COPPERWELD STEEL COMPANY

February 21, 1973

Mr. John Oelerich, Executive Vice President
Curto, Reynolds & Oelerich, Inc.
Suite 2475
Two First National Plaza
Chicago, Illinois 60670

Dear Mr. Oelerich:

It is possible that you may be asked to consider supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler, and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube as President and Chief Operating Officer under our ownership, or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement, but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are neces-

sary to protect our rights under the terms of our purchase agreement, and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler.

Mr. Grohne has been put on notice in a similar fashion of our intention to fully protect our know-how, trade secrets, etc.

Very truly yours,

/s/ PHILLIP H. SMITH

Phillip H. Smith

PHS/pm

cc: F. L. Seamans, Esq., General Counsel
Eckert, Seamans, Cherin & Mellott
1000 Porter Building
Pittsburgh, Pennsylvania 15219

PLAINTIFF'S EXHIBT 730

INDEPENDENCE TUBE CORPORATION

May 22, 1973

Mr. John J. Mullen, President
Abbey Etna Machine Company
East Indiana Avenue
Perrysburg, Ohio 43551

Dear Jack:

In confirmation of our discussions we are enclosing the following documents;

1. Independence Tube Corporation purchase order #101, to Abbey Etna Machine Company, covering the 7 X R. F. Weld Tube Mill.

2. Independence Tube Corporation Balance Sheet dated December 31, 1972.

3. Cash Flow Statement covering the period through June 30, 1974, the projected acceptance date.

4. Master Lease Agreement with Continental Illinois Leasing Corporation dated November 15, 1972.

5. Master Lease Agreement extension dated January 22, 1973.

Based on your quotation, we have assumed that the equipment will be delivered in March 1974. We would appreciate a review and confirmation of the delivery date as soon as practical so that we can plan accordingly.

We certainly look forward to working with you again on this mill project. After you have finished reviewing the lease agreement and the extension, please return them to us.

Very truly yours,

/s/ DAVID F. GROHNE

David F. Grohne
President

DFG:mg

PLAINTIFF'S EXHIBIT 740

INDEPENDENCE TUBE CORPORATION

January 15, 1974

Memo to file:

RE: Telephone conversation between Mr. Jack Mullen, Abbey Etna Machine Co. and Phillip Smith, Cooperweld Corp. as related to D. Grohne by Jack Mullen on 1-15-74

The telephone conversation took place on 12-13-73 according to notes read to me by Jack Mullen. Smith called and was questioning whether Abbey Etna was furnishing the mill for Independence Tube and Mullen confirmed that they were doing so. Smith was furious and attempted to convince Mullen that it was illegal for them to furnish the mill because Copperweld had a non-compete agreement with Lear Siegler, they had purchased the trade secrets of Regal and that it was illegal for Independence to acquire this machinery for making tubing. Mullen informed him that the machinery was a duplicate of a mill they had furnished to a Canadian competitor and also that they were quoting the same mill to another competitor in Canada at this time. He also told Smith that there were no trade secrets that he knew of used in the manufacture of welded steel tubing and that the majority of the people in the business have worked for two or more competing companies in the industry—(it is common in this industry for employees to compete with their former employer). He told Smith that the mill sale was a normal commercial transaction which they entered into in competition with the other tube mill manufacturers. Smith also discussed the possibility of Independence using secret customer lists to which Mullen replied that everyone in the business knows who the customers are. Smith was particularly upset with what he felt was the theft of employees

from Regal and Mullen informed him that people in the industry have a tendency to be somewhat transient.

Mullen advised me that he would send us a copy of the letter he received from Copperweld in early December. He said he had discussed the problem with their attorney and that as a result of the telephone conversation with Smith they did not send a written reply to Copperweld.

By /s/ D. GROHNE
D. Grohne

PLAINTIFF'S EXHIBIT 995

IN THE

United States District Court

For The Western District of Pennsylvania

COPPERWELD STEEL CORPORATION, a Pennsylvania corporation,

Plaintiff

vs.

IMETAL, a French corporation,

Defendant

Civil Action No. 75-1119

PROCEEDINGS

Hearing on Motion for Preliminary Injunction in the above-entitled action, commencing on September 16, 1975, Pittsburgh, Pennsylvania, before Honorable John L. Miller, Senior District Judge.

Marilyn Brown
Marion C. Wike
Official Reporters

VOLUME 2—September 16, 1975

that have an effect on the competition that Copperweld wants as a purchaser of raw material?

A Yes, I think so, yes. I think in the position we are in today, while we are able to maintain a very fair stance with our suppliers, we do see to it that the raw materials we are buying are being bought at the lowest possible cost. I think that we do that and maintain a very fair balance with our suppliers.

I think in that situation here, I think we would be also then exposed to ending up with what I would call a directed supplier arrangement, "You will take such and such from so and so."

Q When you spoke before of your carefully cultivated relationship with the suppliers, you don't mean to indicate you don't make them be competitive in their supply position with Copperweld, do you?

A Mr. Morgan, we know how to be competitive and we are competitive every day of the week.

Q On both the buying side and selling side?

A Yes, sir, we do.

Q Does that same freedom as I have just indicated come over to the selling side; you need to be in a position to make quick decisions and appropriate moves in order to remain competitive on the sales side of the market too?

A That is right. That it why we delegate a great deal of authority to our divisions. We leave decisions on marketing, procurement, at the division level. We maintain oversight, but those decisions have to be made at the division level, so you can get prompt responses to the marketplace.

Q So, basically—

A Market demand.

Q Basically, your philosophy is one of decentralized management; to let your people in the field react to the market?

A Absolutely.

I think one of the greatest scholars of economics, Alfred P. Sloan says one thing he taught in his General Motor's experience is decentralized management and we practice that in Copperweld. We think that is fundamental.

Q Would that philosophy be disrupted, if you were a part of an Imetal group even for a short period of time?

A That is hard to predict. The thing that is somewhat distrubing, as we read the Imetal report and the Director and Chairman's letters, the point is stressed that the centralized control is going to be there. I think once you become centralized, it would be control coming from Paris or some other place, wherever the control happens to be.

I think you are going to lose some flexibility and responsiveness at the field level, the divisional level.

MR. MORGAN: Thank you.

PLAINTIFF'S EXHIBIT 1057

Draft of 2/2/73

Gentlemen:

We have heard that you are considering supplying part or all of the financing needed by David F. Grohne for his entry into the manufacture and sale of tubing products. Our information is that the name he will probably use for this enterprise is The Independence Tube Company.

In February of 1972, this corporation bought the Regal Tube Company, Chicago, Illinois, from Lear Siegler and at that time Mr. David F. Grohne was the acting head of the Regal Tube Company.

Mr. Grohne led us to believe that he would either continue at Regal Tube under our ownership or work for Lear Siegler, and we are greatly concerned if he contemplates entering the structural tubing market now in competition with Regal Tube.

Not only is there a non-compete on the part of Lear Siegler in our purchase agreement but we specifically bought "all know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

In view of your potential interest in this enterprise, we want to put you on notice that under the above circumstances we intend to take any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc. which we purchased from Lear Siegler.

Very truly yours,

PLAINTIFF'S EXHIBIT 1057

Draft of 2/2/73

Dear Mr. Grohne:

We understand that you are considering engaging in the tubing business in competition with Regal Tube Company which, as you know, we purchased from Lear Siegler last February.

We want you to know that among the items we purchased from Lear Siegler was:

> "All know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to the business of Regal."

When we purchased Regal Tube from Lear Siegler, we understood that you would either remain at Regal Tube under our ownership or work with Lear Siegler. Nothing was said about the possibility of your entering into a competing business.

You should also know that the purchase agreement contains the following provision:

> "LSI agrees not to engage in the business conducted by Regal, nor to permit any subsidiary over which it has control to engage in such business, anywhere in the United States, for a period of five years following the Closing Date. This Section shall not be applicable to any present activity of LSI or any of its subsidiaries."

We are writing you to advise that if you do in fact engage in the manufacture and sale of tubing products in competition with Regal Tube, we will take any and all steps which are necessary, including the institution of suit, to protect our rights under the terms of the purchase agreement and to protect the "know-how, technical information, designs, plans, drawings, trade secrets, and inventions pertinent to

the business of Regal", which we purchased from Lear Siegler.

Very truly yours,

PLAINTIFF'S EXHIBIT 1060

COPPERWELD

Interorganization Correspondence

To: P. H. Smith

Date: 2/23/73
From: Pat Morgan
Subject: David F. Grohne

Mr. Smith:

At appoximately 1:50 p.m. this afternoon, Mr. Grohne called, person to person, to speak with you. When I explained to the operator that you were out of the country, Mr. Grohne began to ask when you would return, could you be reached, etc. At this point, I asked the operator if Mr. Grohne would speak with me as I was Mr. Smith's secretary. Mr. Grohne agreed to this, and I explained to him that I felt this would be better than trying to answer questions through a telephone operator.

I told Mr. Grohne you had left this morning for Japan & would not be back in the office until March 19. He asked if you could be reached anywhere and I told him you would be staying at the Palace Hotel. Mr. Grohne said he would very much like to talk with you, and at this point I suggested that I try to reach you in Japan and ask you to return his call. Mr. Grohne said he would very much appreciate this, and said he could be reached at 312: 246-5077. [Handwritten note: I do not intend to call him, Zeke, I think it would be a mistake.]

Mr. Grohne then stated that his Counsel had tried unsuccessfully to reach our Counsel yesterday, and had been advised that Mr. Seamans was also out of the country. I told Mr. Grohne that this was so, and explained that Mr. C. Arthur Wilson of our General Counsel's office would be handling our matters in Mr. Seaman's absence. Mr. Grohne asked if I would have Mr. Wilson call either Mr. Victor Grimm or Mr. John Laughlin of Bell, Boyd, Lloyd, etc., at

312: 263-1131. I said that I would, and this request was made to Mr. Wilson.

Mr. Grohne thanked me for my help, and I told him I would see that you received his message.

/s/ PAT
Patricia A. Morgan

[Handwritten note: Zeke: I think that Art can handle this; we may want to call him tonight, ie. Monday a.m. Pittsburgh and tell him to keep the pressure on. Phil S.]

PLAINTIFF'S EXHIBIT 1194

KIRKLAND & ELLIS

May 3, 1974

Frank L. Seamans, Esq.
Eckert, Seamans, Cherin & Mellot
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

Re: Regal Tube Company

Dear Zeke:

At our last meeting, we agreed to exchange views on the steps which might be taken by Regal Tube Company, as well as by other operations of Copperweld, to help protect their trade secrets and other confidential business information and activities. I sincerely apologize for taking longer than anticipated in giving you our views, but I've been involved in emergency injunction proceedings for several weeks now and simply haven't been able to give this matter the attention it required.

In preparation for setting forth our thoughts on these matters, we have researched the applicable law pertaining both to trade secrets and other types of confidential information and to agreements not to compete, although our analysis of the law is set forth only summarily in this letter. We have also talked to Bedford Foster and visited the Regal plant in order to see what security measures have been followed in the past and what might be adopted for the future.

In making our recommendations, I should emphasize that we have not attempted to determine whether any particular proposal is worth the cost, in terms of the time and effort of management to put it into effect, when measured against the value of the business information or activity sought to be protected. Only the Regal and Copperweld management can make such a determination. Our purpose is simply to sug-

gest various steps which we think should be considered to deal with the problem.

Before turning to those steps, I think it worthwhile to recapitulate the applicable legal principles. Although I'm confident you're quite familiar with those principles, I've set them out since I assume you may wish to pass this letter along to Phil Smith, Bedford Foster and possibly others.

In my opinion, the best, and certainly the most concise, statement of the law is set forth in the American Law Institute's *Restatement of the Law of Torts*, which observes in Section 759 that:

> "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."[1]

It should be noted that the protection accorded by this rule "applies to information about one's business whether or not it constitutes a trade secret" in the strict sense of that term (4 *Restatement of Torts*, p. 23). Thus, protection is accorded not only to such things as secret formulae, patterns and designs, but also to "the state of one's accounts, the amount of his bid for a contract, his sources of supply, his plans for expansion or retrenchment, and the like." (*Id.* at p. 24.) Indeed, the *Restatement* comments that, "There are no limitations as to the type of information included except that it relate to matters in his business." (*Ibid.*)

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[1]The rule set forth in the *Restatement* has been followed in numerous judicial decisions. *See, e.g., Sperry Rand Corporation* v. *Rothlein*, 241 F. Supp. 549 (D. Conn. 1964); *Cudahy Company* v. *American Laboratories, Inc.*, 313 F. Supp. 1339 (D. Neb. 1970); and *Republic Systems and Programing, Inc.* v. *Computer Assistance*, 322 F. Supp. 619 (D. Conn. 1970), for several recent examples.

Despite this rather broad statement of the information which is protected, the *Restatement* does make the caveat that:

> "Generally, however, if the improper discovery of the information is to cause harm, the information must be of a secret or confidential character. Thus, if one freely gives full information about the state of his accounts to trade associations, credit agencies or others who request it, the possession, disclosure or use of the same information by one who procured it through improper means can hardly cause him harm. On the other hand, if one has a closely guarded trade secret, another's discovery of it may reduce its sale value even before any other disclosure or use is made of the secret." (*Ibid.*)

Of course, the key point which brings into play the rule stated in Section 759 of the *Restatement* is that the business information or activity must be obtained by a competitor through "improper means." As the *Restatement* points out, this includes such diverse means as "theft, trespass, bribing or otherwise inducing employees or others to reveal the information in breach of duty, fraudulent misrepresentations, threats of harm by unlawful conduct, wire tapping, procuring one's own employees or agents to become employees of the other for purposes of espionage, and so forth." (*Ibid.*)

While the competitor's use of "improper means" is of critical importance, it is readily apparent that this key element is closely related to the "confidentiality" factor noted earlier. This is because if security is maintained over a company's business information and activities, it is highly unlikely that a competitor will be able to obtain the information except through theft, industrial espionage, inducing an employee's breach of his duty to his employer, and the like. As a result, three basic guidelines should be followed by companies, such as Regal and Copperweld, which are seeking to protect their commercial information and processes from competitors:

First, they must themselves treat the information as confidential, which means maintaining reasonable security measures and avoiding disclosure except under controlled circumstances.

Second, they must make every effort to have their employees treat the information as confidential, which means issuing instructions and obtaining agreements to maintain its confidentiality.

Third, they must give as much notice as possible to third parties regarding the confidentiality of the information through appropriate signs and identifying markings.

Although involving slightly different considerations, the company seeking to protect its business interests should also consider obtaining agreements by key employees that they will not compete for a reasonable period of time after the termination of their employment. Otherwise, the law is clear that a former employee is free to enter into competition with his former employer and to use whatever general information he learned concerning the business methods and operations of his former employer. Of course, the former employee is under an obligation not to use or to disclose to his new employer or to other third persons any trade secrets or other matters which he agreed to maintain in confidence. But even as to the latter matters, the employee's obligations should be spelled out in writing. This is because questions may arise as to the exact scope of the employee's undertaking and the courts are likely to lean in favor of the employee absent an explicit agreement on his part.

Turning now to the Regal situation, it is readily apparent that it has failed in the past to meet the three guidelines referred to above. Part of the failing arises from the fact that its basic mill operation is fairly well-known to knowledgeable persons in the trade and thus cannot be classified as involving trade secrets. However, little or no security has been maintained even with regard to those specific matters that could legitimately be considered as confidential to the

company. Thus, there is relatively open access to the plant and to files; there are no sign-in or sign-out procedures; none of the plant areas are marked as "restricted" and few documents are marked as "confidential"; there are no inhibitions on copying or removing documents, etc. Moreover, the company has issued no instructions to nor obtained any agreements from its employees that they will not disclose information when their employment terminates, nor does it have any agreements with key employees restricting their future competition. To remedy this situation, we suggest that the following five-point program be undertaken by management:

1. **Prepare an inventory of matters to be treated as confidential.**

As a first step, Regal should prepare a listing of the business information and processes that it believes should be considered for protection. By way of example, if there are particular mechanical devices or processes, such as the scarfing devices or the mandrels, that it believes are important to its operations and that are not readily available to competitors, these should be identified. The same applies to particular areas in the plant or the office. Thus, it may be desirable to treat the area where new tooling is fabricated as a restricted area. The same may hold true for the office area where tools are designed and should certainly be the case with Bedford Foster's office.

A similar listing should be made of all confidential documents generated within the Regal operation or obtained from other Copperweld divisions. This listing should probably include such items as financial plans, profit and loss statements, customer lists, pricing information and strategies, sources of supply, plant and tooling designs, and the like.

In addition to listing the processes, plant areas and documents to be protected, each should be assigned a priority in terms of its relative confidentiality. Thus, some information may be extremely secret and important to the corporation, whereas other information may merely fall into a class

where it would be nice to keep the information from competitors, but not worth a major effort to do so. The list should also specify by job title the employees who should have access to each piece of business information or plant activity. Obviously, this list should be drawn as narrowly as possible, so as to limit the opportunities for security breaches and to evidence the company's view that the matters are really confidential.

2. Clearly identify all confidential matters as such.

Once a decision is made as to information and activities to be protected, the second step is to identify those matters for employees and outsiders. In the case of the plant as a whole, this may mean fencing the perimeters and posting "Restricted to Authorized Personnel" signs. Inside the plant, areas which are to be treated as "Restricted" should also be clearly marked. The same identification procedures should be followed in the case of file cabinets or other storage areas. Finally, all documents which are to be treated as confidential should be clearly labeled as such. The label should also state the document is the property of Regal Tube and that any use or copying by others is unauthorized. In the case of particularly sensitive documents, it may also be desirable to state that access to the documents is limited to particular individuals or particular groups of individuals.

3. Set up security measures to protect all confidential matters.

In addition to identifying the company's confidential information and activities as such, it is essential that appropriate procedures be set up to insure that the confidentiality is maintained. For the plant as a whole, this should probably involve limiting access, providing locks and guards, and other surveillance devices. In this area, as in a number of others, it may be worthwhile consulting with a professional security firm to ascertain their thoughts regarding appropriate security procedures and equipment.

In addition to setting up security measures for the plant as a whole, procedures should be adopted to insure that all

visitors are signed in and out of the plant. At the time of the sign-in, it would also be desirable to advise visitors that they are entering a "Restricted Area" and that no information obtained may be used or disclosed without appropriate authorization. When visits are arranged for competitors, trade groups, tooling suppliers, etc., it may also be advisable to consider obtaining their agreement to specific restrictions on their use and disclosure of any information.

As to specific sections of the plant which are to be treated as "Restricted Areas", arrangements should be made for locking these areas and restricting access by visitors and employees, except where specifically authorized. The same security measures should be taken with regard to file drawers and other storage areas. Keys should be regularly inventoried and returned when employees either leave or are assigned to other duties. Arrangements should also be made to see that no confidential documents are Xeroxed, except with specific authorization, and that the same applies to removing documents from the building.

4. Issue instructions to, and obtain agreements from employees regarding confidentiality.

All employees should be made fully aware of their confidentiality obligations. Thus, the employee manual should include a specific section outlining the employee's responsibilities and duties in this regard. Among other things, the manual should point out that all information obtained as an employee should be treated in confidence by him and that none of it should be disclosed to third parties except with specific prior authorization. An appropriate person or persons should be designated for the purposes of granting such authorization. In addition, the manual should advise the employee that specific instructions will be issued from time to time regarding access to particular areas and documents. He should be told that he must abide by those specific instructions.

To supplement the employee manual, reminders should be sent to all employees from time to time concerning the

importance of maintaining appropriate security measures. This reminder can be in the form of a reprint of the section of the manual on this subject. Additionally, at the time any employee is terminated or leaves, he should be reminded of his obligations and instructed not to disclose any confidential information to his new employer or others. Where appropriate, the employee should also be advised that violations of these obligations may give rise to legal proceedings against him.

In addition to these steps, consideration should be given to having each new employee sign a specific agreement regarding his confidentiality obligations. This agreement should be simply drawn so that the employee is clear as to what he may or may not do. The signing of the confidentiality agreement should be made a condition of employment.

Beyond these generalized instructions and agreements, specific instructions should be prepared with regard to particularly sensitive matters. For example, persons working on tool and plant design should be given specific instructions concerning those matters that may not be disclosed to outsiders, or even to other employees. Specific instructions should also be given, for example, to sales personnel regarding sales records, pricing practices, etc. Efforts should be made to revise and update these specific instructions from time to time to make certain that they reflect changes in the company's view on what is to be treated in confidence and the security measures to be followed.

5. Obtain non-competition agreements from key employees.

In the case of key management and supervisory personnel, consideration should be given to employment contracts varying with the employee's importance to the company. In general, no contract should be for less than a year. Such contracts will not only preclude the employee from leaving on short notice, but will also bar competitors from seeking to induce them to leave—a prohibition which does not apply where employees have no contract. The employment con-

tracts should contain an express agreement that the employee will not enter into a competing business or use any confidential information following the termination of his employment. The confidentiality agreement can be unlimited; the non-competition agreement must be limited in time and geographic area. Depending upon the importance of the employee and the length of his employment contract, the non-competition clause could probably run up to five years. The geographic area should probably be limited to a 150 to 200 mile radius around the Chicago metropolitan area due to the restrictive view which the Illinois courts have taken towards such non-competition arrangements.

In making the suggestion that employment contracts be considered, I wish to reiterate a point touched on earlier. Only management can determine whether the financial costs involved are worth the advantages to be obtained from the non-competition arrangement. There also may be other considerations to be taken into account, such as the impact which such employment contracts may have on unionization efforts and employee relations.

In conclusion, I wish to note that the foregoing suggestions are far from exclusive. I am sure that you, Phil and Bedford may have other matters that you think should be considered. However, I believe that the foregoing should provide a basic check list to guide the company in obtaining better protection for its confidential business information and activities than has been the case up until now.

I look forward to receiving your comments and suggestion regarding any or all of the foregoing.

Sincerely,

/s/ BILL

William R. Jentes

WRJ:fec

DEFENDANT'S EXHIBIT 168

January 7, 1972

Mr. Robinson

Dave Grohne

You may recall when we merged with Lear Siegler we told them that we would double Regal's fiscal 1967 sales and earnings of $6,821,000 and $960,000, respectively, in three years. Unfortunately, the first half of fiscal 1971 (July 1, 1970 through December 31, 1970) was a very poor period for us, and we therefore did not achieve the goal in our third full year with LSI. Instead it took 3½ years. For the calendar year 1971 which we have just completed, sales were $14,314,000 and earnings before tax and Corporate overhead charges were $2,057,000. Needless to say, I am proud of our accomplishment.

Now for the news, since I am sure the preceeding comes as no big surprise to you. Yesterday LSI signed an agreement with Copperweld Steel to sell them Regal Tube and the sale is scheduled to be completed on February 29. I have been offered a position in Santa Monica functioning as an assistant to Bob Campion, the title for which would be Corporate Secretary to LSI. Also, Copperweld has asked me to continue with them as General Manager of Regal Tube. My present inclination is to tell them both to stick it, but in either event, I'll let you know what happens.

My best regards to both you and Mrs. Robinson. I trust she is in good health and you're too ornery to get sick.

DEFENDANT'S EXHIBIT 168

REGAL TUBE DIVISION
Summary Sales and Earnings Before Tax and LSI Charges

Fiscal Years Ending 1964 through 1972
(000's omitted)

	Sales	Net income before tax Group & Corp. Chgs. $	Net income before tax Group & Corp. Chgs. ROI	Depreciation	Cash flow before tax $	Cash flow before tax ROI	Investment
FY 1964	$ 2,656	173	30.4%	$178	351	61.7%	$ 569
FY 1965	4,874	424	59.3	185	609	85.2	715
FY 1966	6,898	782	75.3	157	939	90.5	1,038
FY 1967	6,821	960	53.3	144	1,104	61.3	1,801
FY 1968	7,111	1,072	48.9	158	1,230	56.1	2,193
FY 1969	6,762	1,014	47.4	124	1,138	53.2	2,138
FY 1970	7,598	761	13.7	225	986	17.8	5,545
FY 1971	11,496	1,314	21.5	352	1,666	27.2	6,121
CY 1971	14,314	2,057	33.9	343	2,400	39.5	6,063
FY 1972*	15,446	2,299	36.1	345	2,644	41.5	6,374

* 6 mos. Actual plus 6 mos. S/T forecast.

Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION AND REGAL TUBE COMPANY,

Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

VICTOR E. GRIMM
(Counsel of Record)
JOHN R. MYERS
SCOTT M. MENDEL
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Attorneys for Respondent

Dated: February 28, 1983

Merrill/Gunthorp Warren, Chicago • 372-2800

QUESTIONS PRESENTED

In this antitrust action, a unanimous Court of Appeals found "unassailable" the conclusion that Petitioners, parent and subsidiary corporations, engaged in a conspiracy to exclude a competitor by inducing suppliers to refuse to deal with Respondent. Those activities succeeded in excluding Respondent from the structural steel tubing market for a substantial period, thereby precluding price competition and restricting product supply. The questions presented are:

1. Whether this Court should overrule its decisions of the last thirty-five years and judicially create an exemption under Section 1 of the Sherman Act for otherwise unlawful combinations or conspiracies when perpetrated by separate but affiliated corporations.

2. Whether exclusion of a competitor thereby eliminating price competition and reducing product supply constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

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NO. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION AND REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATUTES

Section 1 of the Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

Section 8 of the Sherman Act, 15 U.S.C. §7, provides in pertinent part:

> The word "person," or "persons," wherever used in Sections 1 to 7 of this title shall be deemed to include corporations....

STATEMENT OF THE CASE

A. Introduction

Petitioners would have the Court believe that this case involves nothing more than a tort claim masquerading as an antitrust action. (Petition at 2, 22) To the contrary, this case is a classic example of the kind of concerted predatory activities and adverse competitive effects that the antitrust laws were intended to proscribe. *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334, slip op. at 9 (U.S. February 22, 1983); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Driven by fears of price competition, Petitioners conspired from 1973 to 1975 to exclude Respondent from the structural steel tubing market. To achieve that end, Petitioners, through threats and intimidation, sought to establish a group boycott of Respondent by its suppliers. As a direct result of the conspiracy, Respondent was excluded from the market for as long as one year, thereby reducing product supply and inflating prices for as long as two years.

This Court has consistently recognized that in such anticompetitive circumstances "private suits are an important element of the Nation's antitrust enforcement effort...." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S.Ct. 1935, 1945 n.10 (1982). Nevertheless, Petitioners now implore the Court to create a new antitrust exemption that would permit them to escape the consequences of their anticompetitive actions.

B. Background of the Case

The factual summary contained in the Petition is misleading in its incompleteness and characterizations, and contains inferences obviously rejected by the jury, the District Court and the Court of Appeals. Therefore, a more complete and accurate statement is required.

Regal Tube Company ("Regal"), a manufacturer of structural steel tubing, was acquired by Copperweld Corporation ("Copperweld") from Lear Siegler, Inc. ("LSI") in 1972 as an "ongoing business." (Stip. 15; T. 3031) Regal was separately incorporated and was maintained as an independent profit center because Copperweld's president, Phillip Smith, wanted Regal to "stand on its own two feet." (PX 995; T. 445-46, 4976-81, 6943-44) Bedford Foster, president of the new corporation, assumed the "sole responsibility and authority over the entire operations" of the firm and testified that "in all material respects" the operations of Regal were controlled in Chicago, not in Pittsburgh where Copperweld was located. (PX 579; T. 1762-65)

Foster replaced David Grohne, who continued as an employee of LSI until later in 1972 when he became involved in establishing Independence Tube Corporation ("Independence") as a new structural tubing producer.[1] (Stip. 21, 31-32; T. 207-12) When Foster learned that Independence was being formed, he reported the fact to Smith. They were aware of Grohne's reputation as a "price cutter," and Smith observed that the new enterprise "could create a problem for Regal." (PX 393; T. 1308, 1772-75) At that time, there were only a "few competing companies" which were able to produce the size range of tubing which Independence intended to produce, and Regal's market strategy was to "emphasize pricing stability." (PX 30, 34)

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[1]Independence has no parent or subsidiary corporations.

At Smith's request, Copperweld's attorney considered whether a noncompete agreement between LSI and Copperweld could be used to "stop Grohne." (PX 1055) In response to this inquiry, Smith and Foster were advised that "the noncompete cannot be used against Grohne. . . ." (PX 394) Nevertheless, Petitioners proceeded to contact every conceivable potential supplier of Independence to discourage them from dealing with Independence.

On February 19, 1973, Copperweld learned from a private investigator, who had been retained to conduct surveillance of the new enterprise, that The Yoder Company ("Yoder") had agreed to supply a $1,000,000 tube mill to Independence. Using information supplied by Foster, Smith immediately sent a threatening letter to Yoder, as well as to other mill manufacturers, and to Chicago's two largest banks, among others, who were suspected of being financing and supply sources for Independence. Two days later, Copperweld sent similar letters to industrial real estate firms identified by Foster to be negotiating with Independence for a factory site. (PX 66, 132, 141, 168, 214, 236, 408, 431, 443, 446, 718)

In total disregard of the legal advice Smith and Foster had received, the letters implied that Grohne was covered by a noncompete agreement. These letters threatened "any and all steps" to pursue Petitioners' "rights" under the agreement and to protect Regal's alleged "trade secrets." (PX 66) As Foster well knew, and as William Jentes of the Kirkland & Ellis law firm later advised, Regal's operation "cannot be classified as involving trade secrets." (PX 1194; T. 6049-51)

Yoder recognized that the intent of Smith's letter was "scaring off potential suppliers and customers" of Independence, but did not want to offend its "good customer and prospect, Copperweld." Therefore, Yoder immediately cancelled its agreement

to supply a tube mill to Independence.[2] (PX 77, 78; T. 2659-61) Independence requested that Copperweld retract its letter so that Yoder might proceed, but Copperweld refused. Smith insisted that they "keep the pressure on," and remained convinced that "there is plenty we can do to block Grohne." (PX 430, 433, 1060; T. 6064-67) What followed was a second and third wave of letters to mill manufacturers, a second set of letters to real estate firms, and persistent personal contacts by Copperweld and Regal with suppliers, and later with customers, discouraging them from dealing with Independence. (PX 90, 92, 223, 237-38, 448-49, 451-53, 740, 1100, 1105; T. 498-502, 508-10, 1333-37, 1561-69, 2242-52, 2256, 2392-93, 2395-96, 2448-50, 2453, 2461-63, 2470-71, 2662-63, 2666-68, 2670, 2683-84, 4047-50)

One of the remaining mill manufacturers, Abbey Etna Machine Company ("Abbey Etna"), assured Foster that it "would certainly not be doing business" with Independence after it received the first of three letters from Copperweld. When Foster learned that Abbey Etna later agreed to supply a mill to Independence, he notified Smith and pointed out that the mill would cover "a most important part of our size range." Smith in turn told Abbey Etna's president that it would be "illegal" to supply the mill and threatened to sue both Abbey Etna and Grohne. (PX 448, 740) Copperweld's counsel had advised Smith that same day, however, that any such action would be unsuccessful and would trigger a substantial antitrust counterclaim. Smith had been previously warned of the danger of such an antitrust suit by Independence based on a claim that Petitioners had "harassed potential financial and equipment suppliers from doing business

[2] Yoder later protested that, despite its compliance with Petitioners' desires not to deal with Independence, Petitioners had not reciprocated by considering it as a supplier for two large mills. Yoder was assured that it would receive consideration on future projects. (PX 98, 411; T. 1428-29, 1432-34)

with him, thus restricting competition." (PX 449, 481) Nevertheless, Copperweld's counsel, who was also a member of its board of directors, had recommended that Grohne be "kept under continued surveillance and once he starts to operate or solicit business we should pounce on him." (PX 478)

Copperweld and Regal enforced their threats by retaliating against those firms which continued to deal with Independence. Regal "shut off" a steel supplier; and Copperweld and Regal withdrew their accounts from the bank which had financed Independence even though the bank had refused to extend the term or increase the amount of its loan commitment to Independence as a result of pressure from Petitioners. (T. 314, 2314-15, 2464-65, 2662-64, 2871-74, 3756-57)

Petitioners' boycott efforts excluded Independence from the structural tubing market for at least nine months and more probably a full year, thereby substantially affecting price and product supply.[3] Moreover, the Abbey Etna mill was incapable of producing the larger sizes of tubing that the Yoder mill could have produced. As a result, Independence has been completely excluded from a portion of the market where a very few firms have preserved high prices and profit margins. (PX 34, 52, 53, 770; T. 317-21, 2479-84, 6855, 8891-92, 9918-23)

Petitioners had recognized that Independence would be a "price cutter" and would likely have a substantial effect on a market where price is the "primary determining factor to the customer." (PX 30; T. 1308) Regal began to moderate its prices

[3]Independence entered the market at the height of a severe shortage of raw steel and, because of the delay, had been unable to obtain advance commitments for steel, resulting in further reductions in structural tubing supply during the remainder of the shortage period. (T. 321-23, 328, 2399-2402, 2478, 2882, 6890-96)

in March 1974, six months before Independence began production, so as not to "make it easy for Independence Tube to enter the market." (PX 43) But for Petitioners' exclusionary efforts, that price moderation would have begun a year earlier.

Independence ultimately succeeded in bringing significant new price competition in tubing sizes where there had been high market concentration and little price competition. Regal attempted to preserve that price stability and to act as a price leader even after Independence entered the market. Nevertheless, throughout 1975 and 1976 Independence led a substantial price decline, forcing Regal and others to continually reduce their prices. When Regal's largest customer insisted that Regal meet Independence's prices or lose business, Regal complained that its cost structure did not permit further price reductions. Shortly thereafter, Petitioners made unsuccessful overtures to acquire Independence. (PX 34, 106, 334, 473, 620; T. 352-54, 2313, 2477-84, 2691-2906, 3911-21, 4729-30, 6778-79)

REASONS FOR DENYING WRIT

In order to avoid liability for their anticompetitive activities, Petitioners ask this Court to ignore the clear statutory mandate of the Sherman Act, to overturn thirty-five years of uninterrupted Supreme Court decisions and to create a new antitrust exemption for restraints of trade perpetrated by a parent and its wholly-owned subsidiary. Petitioners' plea for such a revolutionary revision of antitrust law and policy is more properly addressed to Congress than to the Court.

The legislative history and the statutory language of the Sherman Act clearly establish that Congress intended to prohibit unreasonable trade restraints, regardless of whether they were imposed by affiliated corporations or by unrelated firms. Consistent with this statutory mandate, the Court, since at least *United States* v. *Yellow Cab Co.* , 332 U.S. 218 (1947), has repeatedly

refused to create a judicial exemption for affiliated corporations and has held that the proper approach in such cases is to focus on the competitive impact of the practices in issue. Where such practices impose anticompetitive restraints upon third parties, as distinguished from restraints solely concerning internal corporate affairs, the Court has held that the Sherman Act may be violated. *See, e.g.*, REP. OF THE ATT'Y GEN'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 34 (1955) ("ATTORNEY GENERAL'S REPORT").

Petitioners do not contend that there is any conflict among the circuits as to whether affiliated corporations are legally capable of conspiring. They argue instead that there is "disarray" among the lower court opinions. The alleged differences in these opinions, however, are a reflection of differing fact situations; they do not represent conflicting legal principles. The courts of appeals have given attention to the competitive effects of the practices in issue, and, in so doing, they have considered the antitrust significance of the corporate relationships among alleged conspirators.

Petitioners ask the Court to "fashion a new rule" of *per se* lawfulness for parent-subsidiary activities regardless of how pernicious their anticompetitive purpose or effects. Such a rule would collide with national antitrust policy and would represent an impermissible, judicially created exemption from the antitrust laws. *United States* v. *Topco Associates*, 405 U.S. 596, 611 (1972).

Petitioners also argue that there was insufficient evidence of adverse competitive effect in this case, despite the increase in price and decline in product supply that resulted from their acts. In order to escape the impact of that evidence, Petitioners ask the Court to judicially create a second new antitrust rule which would excuse anticompetitive conduct unless defendants are also shown to have some undefined level of "market power." There is no logical or legal basis for such a rule.

I. There is no Basis for Reconsideration of This Court's Decisions Holding That Conspiracies Between Affiliated Corporations are not Exempt From The Sherman Act.

A. This Court's Decisions are in Complete Accord with Congressional Intent and are not a Source of Confusion.

In seeking reversal of the long line of Supreme Court cases dealing with conspiracies between affiliated corporations, Petitioners contend that those decisions are a source of "uncertainty" and "confusion." (Petition at 17-19) Yet, this Court's decisions are a manifestation of congressional intent and provide a practical basis for effectuating national antitrust policy.

By its adoption of the Sherman Act, Congress established a national antitrust policy against unreasonable restraints on free competition. Congress was primarily concerned with the substantive effects of trade restraints and not with the form by which any particular restraint might be imposed. Thus, the Sherman Act was intended to apply to every form of "coordination from the loosest general understanding to the tightest-knit integration." Bork, *The Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 22 (1966). In accordance with this objective, the common law principle that corporations are distinct legal "persons" and are therefore capable of conspiring together became a basic Sherman Act tenet. 15 U.S.C. §§1, 7; L. SULLIVAN, LAW OF ANTITRUST 327 (1977). Indeed, one of the primary targets of the Sherman Act was the commercial "trust" which consisted of separate but commonly owned or controlled economic entities. *See, e.g., Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911).[4]

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[4]Section 1 specifically prohibits every "combination in the form of trust or *otherwise*" which restrains trade. During the congressional debates, Senator Teller, specifically referring to the members of the Standard Oil trust, stated: "Each corporation is a creature by itself." 21 CONG. REC. 2571 (1890), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 182 (1978). Similarly, Senator Sherman considered "combination" as used in the Act to include combinations of affiliated corporations. The crucial factor to be considered was the combination's effect on competition. 21 CONG. REC. 2457-60 (1890), *reprinted in* E. KINTNER, *supra*, at 117-21.

Conspiracy cases involving parent-subsidiary relationships were among the first Sherman Act cases to reach this Court. In *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), the defendant and five of its "accessory corporations" were charged with a Sherman Act conspiracy. In holding that American Tobacco and its subsidiary corporations violated Section 1, the Court stated: "[T]he combination as a whole, involving all of its cooperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section ...." *Id.* at 184. *See also United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 376-77 (1933).

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the Court was asked for the first time to judicially create an exemption for parent-subsidiary combinations. In refusing to do so, the Court relied upon the clearly manifested legislative intent:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate inter-relationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377.

> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act.

332 U.S. at 227.

The Court applied the principles of *Yellow Cab* in *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948) and in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). In both cases, the Court was presented with the same argument which Petitioners repeat here, that common ownership should free corporations from Sherman Act Section 1 coverage, and in both cases, the Court declined to read any such exception into the statute. Thus, in *Kiefer-Stewart*, a unanimous Court stated:

> Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws.

340 U.S. at 215. *See also Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951).

The Court again squarely addressed the issue in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). There, the court of appeals had affirmed dismissal of the complaint before trial on the ground, among others, that the affiliated corporate defendants were incapable of combining or conspiring

under the Sherman Act. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 376 F.2d 692, 699 (7th Cir. 1967). The Court reversed and unequivocally stated:

> [S]ince respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.

392 U.S. at 141-42.[5]

The Petition incorrectly suggests that some "recent" pronouncements of this Court represent a departure from these consistent holdings. (Petition at 18-19) To the contrary, the cases cited by Petitioners reaffirm those principles. For example, in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), the Antitrust Division challenged certain practices of affiliated corporations. In ruling on those practices, the Court engaged in an analysis which considered: (1) the nature and extent of the relationship between the affiliated corporations, and (2) the competitive effects of the challenged practices to determine whether under the particular facts of the case there was an unreasonable trade restraint. In the course of its discussion, the Court again reaffirmed the holding of *Yellow Cab* that "the corporate interrelationships of conspirators . . . are not determinative of the applicability of the Sherman Act." *Id.* at 118.

The *Citizens & Southern* case clearly demonstrates the Court's consistent concern with the competitive impact of the restraint in issue rather than the form by which the restraint is

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[5]Petitioners argue that the Court's rulings in *Yellow Cab* and its progeny were unnecessary to the Court's ultimate disposition of the cases because "alternative" grounds might have been found to support the result. (Petition at 16-18) However, in each decision the Court expressly held that a parent and subsidiary are capable of combining or conspiring in violation of Section 1.

imposed.[6] Thus, the legal analysis in parent-subsidiary cases is simply a rule of reason approach extended to give consideration to the circumstances of the corporate relationships as well as to the competitive effects of the restraint. Where affiliated corporations are doing nothing more than dealing with internal management affairs, their activities may have no antitrust significance. However, activities of distinct, but affiliated, firms designed to restrict the trade of third parties are an impairment of free competition; that *is* of antitrust concern.

The correctness of these holdings has long been recognized by the Justice Department and by antitrust commentators. The Report of the United States Attorney General's Committee to Study the Antitrust Laws stated:

> The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. . . . Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated.

ATTORNEY GENERAL'S REPORT, *supra*, at 34. The Antitrust Division of the Justice Department adopted the analysis of the

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[6]Similarly, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court gave effect to the statutory agricultural exemption by examining the economic realities of the relationship between the affiliated corporations, much as the Court of Appeals did in the instant case. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 318-20 (7th Cir. 1982); App. A-12-17. *See also United States Steel Corp* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 622-23 (1977) (Burger, C.J., concurring) (alleged combination between parent and subsidiary to engage in a tying practice in violation of Section 1 of the Sherman Act).

Attorney General's Report.[7] In 1977, the Division reiterated its position that the Act reaches "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 12 n.26 (1977) ("GUIDE").[8]

Antitrust commentators have also supported this Court's approach. For example, Professor Sullivan's antitrust treatise states:

> Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade.

L. SULLIVAN, *supra*, at 328. The American Bar Association study of the antitrust laws similarly concludes:

> These, and subsequent Supreme Court decisions, seem to indicate that the intra-enterprise conspiracy doctrine will be applied to strike down concerted action between a parent and subsidiary . . . when the challenged conduct has the purpose or effect of unreasonably restraining the trade of unrelated competitors, customers or suppliers.

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[7]The Department has described this Court's decisions as applying "to situations in which commonly controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities." Letter from Richard McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶50,122, 55,197 (Feb. 22, 1971).

[8]Petitioners disingenuously suggest that the ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS takes a contrary view when they quote from the same page, but fail to refer to the passage most directly in point. (Petition at 20-21)

AMERICAN BAR ASSOCIATION MONOGRAPH, ANTITRUST LAW DEVELOPMENTS 33 (1975). *See also* F. EASTERBROOK and R. POSNER, ANTITRUST LAW 730 (2d ed. 1981).

Thus, contrary to Petitioners' assertions, the holdings of this Court are neither confused, nor uncertain. They are understood and recognized as correct applications of the Sherman Act, consistent with congressionally mandated national antitrust policy. There is no basis for reconsideration of these cases.

B. There is no Conflict Among the Circuits.

Petitioners do not contend that there is any conflict among the circuits on the fundamental question presented, that is, whether a parent and subsidiary are legally capable of conspiring. Indeed, the result in this case would have been the same in every circuit. Nevertheless, Petitioners request that the Court create a new rule which is contrary to the decisions of this Court and to those of all the circuits. (Petition at 9)

Petitioners' attempt to portray "disarray" among the circuits is based on a selective and artificial classification of cases which reflects nothing more than the differing fact settings in which the cases have arisen. Those cases do not represent any conflict in legal principles and simply confirm that a rule of reason-type analysis is often fact intensive. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). In compliance with the standards established in this Court's decisions, the courts of appeals give consideration to the nature of the relationship between parent and subsidiary and to the competitive impact of the practices in issue. As applied by this Court in *Citizens & Southern, supra*, that analysis essentially consists of two inquiries: (1) whether it is reasonable to treat the affiliated firms as distinct economic units,[9] and (2) whether each corporation

[9]As Professor Sullivan states, this analysis turns upon a "variety of factors relevant to the statutory purposes." L. SULLIVAN, *supra*, at 326. These factors include matters such as the extent of ownership integration; separateness of management; separateness of physical operations, records and customers; history of the firms; the loss of efficiency if they were required to act as two firms, and the extent to which they can together wield market power not possessed by the firms individually. *Id.* at 328. *See also Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 318 (7th Cir. 1982); App. A-13.

engaged in activities to unreasonably restrain the trade of third parties.

In the present case, the Seventh Circuit conducted such an analysis and examined both the nature of the relationship between Copperweld and Regal and the effect of their conduct. The court found that there was ample evidence to conclude that these firms were operated as separate economic units and not as a single enterprise. The court also determined that both parent and subsidiary undertook acts pursuant to a conspiracy to exclude Independence from the structural tubing market.[10] *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310, 317 n.5, 320-21 (7th Cir. 1982); App. A-10, 17-19. The court concluded that under these circumstances Copperweld and Regal were capable of engaging in a combination or conspiracy under Section 1. *See also William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir.), *cert. denied*, 103 S.Ct. 57 (1982).

A review of the cases cited by Petitioners, which are gnerally the older cases, does not support their assertion of "disarray" among the circuits. Petitioners rely almost exclusively on cases in which the courts found the absence of a capacity to conspire. In the circumstances of those cases, the courts have often found it unnecessary to reach both the issue of corporate separateness and

[10]The record demonstrated that Petitioners acted in concert to use their combined economic power to exclude Independence by contacting those suppliers with which each had business relationships. Each used the leverage of its relationships to put pressure on firms not to deal with Independence. 691 F.2d at 320; App. A-16-17. Regal had business relationships with mill manufacturers, real estate firms and steel suppliers contacted by Petitioners. On the other hand, Copperweld had separate relationships with steel suppliers and banks pressured by Petitioners. Thus, through concerted action, Copperweld and Regal were able to exert combined power which neither possessed individually. (PX 249, 431, 1100; T. 473-85, 496, 599-600, 1119-21, 1333-36, 1792-99, 2140-42, 2244-47, 2683-85, 4047-51)

the issue of restraint on third parties because one or the other of those issues was dispositive.[11] Thus, contrary to Petitioners' argument, no conflict in legal principle is established by the cases.

Petitioners refer to cases which hold that an important consideration is whether an alleged restraint is directed against third parties. (Petition at 13) As discussed above, the imposition of an unreasonable restraint on third parties is a significant factor in parent-subsidiary cases, but it is not the sole factor. The cases cited by Petitioners do not hold otherwise.[12] Indeed, the significance of both the separateness of the corporations and the competitive impact of their activities is clearly demonstrated by the latest court of appeals decision dealing with the parent-subsidiary conspiracy issue. In *General Business Systems* v. *North American Philips Corp.*, 1982-83 Trade Cas. (CCH) ¶65,177 (9th Cir.

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[11]For example, where a parent and subsidiary are both completely controlled by a single individual and are therefore incapable of conspiring, it is unnecessary to consider the nature and effect of the challenged practices. *See, e.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd on other grounds*, 189 F.2d 797 (4th Cir. 1951). Similarly, where communications between a parent and subsidiary concern only internal management affairs, an analysis of the separateness of the corporations is unnecessary. *See, e.g., Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1267 (9th Cir.), *cert. denied*, 103 S.Ct. 348 (1982).

[12]Petitioners complain that it is difficult to distinguish between "internal" and "external" matters. (Petition at 12) However, they confuse an external restraint of trade with an external effect. The cases do not turn upon external effects incident to internal decisions, but upon the existence of restraints imposed on third parties. ATTORNEY GENERAL'S REPORT, *supra*, at 34-35. The cases cited by Petitioners illustrate the proper application of the concept. *Contrast Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Ca. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 450 U.S. 1018 (1982) (agreement between competing sister corporations intended to exclude competitors could be actionable) *with Universal Lite Distributors, Inc.* v. *Northwest Industries, Inc.*, 452 F. Supp. 1206 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979) ("internal dialogue" was involved as distinguished from activities by both firms directed against third parties).

1983), the district court dismissed the parent-subsidiary conspiracy claim before trial. On review, the Ninth Circuit found that conflicting evidence precluded summary judgment on the issue whether the affiliated companies were operated independently. Nonetheless, the court affirmed the dismissal of plaintiff's parent-subsidiary conspiracy charge because there was no evidence of "specific intent or conduct to eliminate" plaintiff from the market. *Id.* at 71,687.

Petitioners also cite to certain cases which have considered whether the affiliated corporations held themselves out as competitors. Contrary to Petitioners' suggestion, these cases do not stand for the proposition that such "holding out" is the sole basis for determining whether firms are capable of conspiracy. (Petition at 12) These cases merely reiterate the statement in *Kiefer-Stewart, supra*, 340 U.S. at 215, that the existence of competition between a parent and subsidiary is one factor to be considered in determining whether it would be appropriate to find a conspiracy in a given case.[13]

Petitioners refer to cases in which the parent and subsidiary were owned and controlled by a single individual. (Petition at 12) In the circumstances of those cases, the existence of such control was determinative in concluding that the two corporations were in substance a single enterprise, incapable of conspiring. In their effort to manufacture a conflict, Petitioners conveniently ignore the recent decisions from the Ninth Circuit which clearly show

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[13]Petitioners completely mischaracterize *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976), where the court expressly reserved ruling on the parent-subsidiary issue. (Petition at 12) Moreover, Petitioners ignore the most recent cases which totally contradict their description of the Second Circuit's opinions. *See, e.g., Reisner* v. *General Motors Corp.*, 671 F.2d 91, 100 (2d Cir.), *cert. denied*, 103 S.Ct. 130 (1982); *Brager & Company, Inc.* v. *Leumi Securities Corp.*, 429 F. Supp. 1341, 1345-46 (S.D.N.Y. 1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert denied*, 451 U.S. 587 (1981).

their characterizations to be incorrect. *See, e.g., Thomsen* v. *Western Electric Co., supra*; *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., supra. See also General Business Systems* v. *North American Philips Corp., supra.*[14]

Finally, Petitioners contend that some courts hold that a parent and subsidiary are automatically capable of conspiracy "without further inquiry." (Petition at 13) Yet, the cases upon which they rely do not support their characterization. The cases hold only that the existence of a parent-subsidiary relationship does not alone immunize the parties from Sherman Act coverage.[15] Again, the most recent cases from the circuits to which Petitioners refer demonstrate a concern with the substance of the relationship between parent and subsidiary and the competitive effects of their activities. *See, e.g., White* v. *Hearst Corp.*, 669 F.2d 14, 15-16 (lst Cir. 1982); *United States* v. *Cotton Baking Co.*, 513 F. Supp. 223, 225-27 (M.D. La. 1981).

Thus, Petitioners' effort to contrive "disarray" among the circuits is not supported by analysis of the cases. The cases upon which Petitioners rely are consistent with the Seventh Circuit's decision in this case and with the decisions of this Court. There is no conflict among the circuits, nor is there any other basis for further review by this Court.

C. Petitioners' Request for an Antitrust Exemption Can Only be Granted by Congress.

Petitioners request the Court to "fashion a new rule" which

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[14]Contrary to Petitioners' assertions, the Fourth Circuit and Sixth Circuit have not directly addressed the parent-subsidiary issue.

[15]In fact, in *Columbia Metal Culvert Co.*, v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978), the court cites with approval Professor Sullivan's analysis which distinguishes between "internal management" matters and concerted action by two legal persons which "erects barriers to entry by another firm." *Id.* at 34 n.49, *citing* L. SULLIVAN, *supra*, at 328.

would hold that subsidiary and parent corporations are not separate legal persons capable of combination or conspiracy, regardless of the anticompetitive effects of their activities.[16](Petition at 9) The creation of such an antitrust exemption would conflict with the language and legislative history of the Sherman Act and be contrary to the consistent holdings of this Court. Such radical changes in antitrust policy and law can only be made by Congress.

As discussed in Part I.A., *supra*, Congress clearly contemplated that affiliated corporations would be within the coverage of Section 1 of the Sherman Act. Since at least 1911, this Court has given effect to that congressional intent and has repeatedly rejected requests for an exemption of parent-subsidiary conspiracies. Congress has amended the Sherman Act on a number of occasions, but it has never made any effort to repeal the Act's coverage of such conspiracies.[17] Most recently, Congress amended the Sherman Act to exempt certain foreign trade activities from its coverage. Foreign Trade Antitrust Improvements

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[16] Petitioners argue that antitrust liability should not turn on so formal a distinction as separate incorporation. As outlined above, however, such liability ultimately turns upon substantive factors, and not upon separate incorporation. Moreover, as Professor Sullivan has stated: "It is perfectly defensible when Congress has sought to cast a wide net to catch restraints of trade to conclude that any two legal persons can conspire." L. SULLIVAN, *supra*, at 327.

[17] Congress has not hesitated to amend the antitrust laws when a decision of the Court is perceived as leading to an inappropriate result. *See, e.g., Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978) (foreign governments entitled to treble damages) and the Foreign Government Damage Recoveries Act of 1982, P.L. 97-393, §2, 96 Stat. 1964 (1982) (amending Section 4 of the Clayton Act to limit foreign governments to single damages); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) and the Antitrust Procedural Improvements Act of 1980, P.L. 96-349, §6(a), 94 Stat. 1154 (1980).

Act of 1982, 97-290, § 402, 96 Stat. 1233, 1246-47 (1982). During the hearings on the Act, Congress extensively discussed the Justice Department's ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS, which, as noted above, specifically states that Section 1 reaches "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." GUIDE, *supra*, at 12 n.26. *See generally Foreign Trade Antitrust Improvements Act of 1982: Hearings on S. 795 Before the Committee on the Judiciary, United States Senate*, 97th Cong., 1st Sess. (1981). Thus, although clearly cognizant that the Sherman Act reaches certain parent-subsidiary conspiracies, Congress chose not to immunize such activities. Indeed, in their discussion of the foreign trade amendments, the sponsors emphasized that Congress did not intend to restrict domestic antitrust enforcement in any way.[18]

In seeking immunity for parent-subsidiary conspiracies, Petitioners request this Court to engage in the legislative process. Thus, Petitioners would have the Court weigh the injury to competition which would flow from creation of the requested exemption against the alleged benefits to corporate planning and efficiency which Petitioners contend would result if affiliated corporations were freed from antitrust liability. Such a weighing process would require a re-examination of the basic public policies underlying the antitrust laws, an evaluation of competing societal interests and a revision of the Sherman Act coverage mandated by Congress. The Court has repeatedly refused to invade that legislative province. *See, e.g., Texas Industries, Inc.* v.

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[18] This Court has consistently recognized that Congress is the only proper forum to consider changes in longstanding and consistently applied statutory interpretations. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); *Snyder* v. *Harris*, 394 U.S. 332, 338-40 (1969); *Canada Packers, Ltd.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 385 U.S. 182, 184 (1966).

Radcliff Materials, Inc., 451 U.S. 630 (1981). As the Court stated in *United States* v. *Topco Associates*, 405 U.S. 596, 611-12 (1972):

> To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.[19]

Moreover, the "benefits" which Petitioners contend would flow from the requested exclusion of affiliated corporations from antitrust coverage are dubious at best. For example, Petitioners argue that potential antitrust liability might discourage subsidiary formation. Yet, during the 90 year existence of the Sherman Act there is no evidence of such discouragement.[20] (Petition at 15-16) In fact, the "benefits of separate incorporation" identified by the Petitioners are largely statutory creations; they are not economic efficiencies which improve competition or benefit the public. Indeed, Petitioners contend that the separate incorporation of

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[19]The Court has reversed its prior Sherman Act holdings in areas involving the standard of proof to be applied, such as, whether a practice should be tested under the *per se* approach or under the rule of reason. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc., supra.* However, the Court has never considered itself free to completely exclude some segments of commerce from Sherman Act coverage. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

[20]M. EISENBERG, THE STRUCTURE OF THE CORPORATION 277-82 (1976). The economic literature indicates that efficiencies are generally derived from the manner in which a division or subsidiary is structured rather than from the fact of separate incorporation. *See, e.g.,* O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 151-54 (1975); R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 38-40 (1974).

Regal was for the purpose of evading taxes, which hardly enhances efficiency or otherwise creates any public benefit.[21] (Petition at 3)

Petitioners suggest that the Court need not be concerned with permitting anticompetitive activities by parents and subsidiaries under Section 1 of the Sherman Act because Section 2 of the Sherman Act and state tort laws provide sufficient coverage. However, as the Attorney General's Report stated, Section 2 of the Sherman Act does not provide sufficient protection from anticompetitive acts of affiliated corporations: "[W]hen a parent and its subsidiary, *though short of an attempt to monopolize*, nonetheless plan to drive out a competitor, Section 1 may be transgressed." ATTORNEY GENERAL'S REPORT, *supra*, at 34 (emphasis added). Similarly, it is doubtful that state tort laws would reach all of the anticompetitive conduct covered by Section 1 of the Sherman Act. Even if they did reach all such activities, however, that would not justify a refusal to enforce the Sherman Act in the way that Congress intended. As this Court recently stated, the antitrust laws are "at least as broad as a plaintiff's right to sue for analogous torts." *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 102 S. Ct. 1935, 1944 (1982).[22]

Petitioners' requested exemption, which would hold that a subsidiary is not a legal person under the Sherman Act, would have serious ramifications in many other areas of the law. This

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[21]Petitioners plead that corporate planning is difficult because of potential antitrust liability. However, the parent-subsidiary conspiracy doctrine has evolved to prohibit exclusionary activities directed at third parties. Thus, corporate planners need only be concerned if they intend to engage in such exclusionary activities.

[22]The fact that Petitioners also tortiously interfered with a contract between Respondent and one of its suppliers pursuant to their conspiracy does not dilute the antitrust significance of their acts. That a contract existed which they were able to interdict was purely fortuitous.

Court has consistently held that under the Sherman Act, as well as other federal statutes, corporate entities "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946).[23] Copperweld and Regal have demonstrably enjoyed the legal benefits of separate incorporation when it has been to their advantage to do so.[24] Now, when Petitioners find it an expedient litigation strategem, they ask this Court to disregard their separate legal status. The Court has dealt with such arguments before and has consistently recognized that affiliated corporations seeking the benefits which the law accords separate incorporation may not elect to disregard that legal status simply because it is advantageous to do so. *Perma Life Mufflers, supra*, 392 U.S. at 141-42.

To disregard separate corporate existence for purposes of antitrust statutes would likely involve the Court in a stream of

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[23]Separate corporate existence is significant in many areas of the law, including corporate liability, personal jurisdiction and venue, taxation, criminal and civil conspiracies and numerous regulatory matters. In these other areas, as in the antitrust area, parents and subsidiaries are treated as separate legal persons except where the parent so dominates the operation of the subsidiary as to require their consideration as a single person. *See, e.g., C M Corp.* v. *Oberer Development Co.*, 631 F.2d 536, 538-39 (7th Cir. 1980). In no instance has the inquiry turned solely on the degree of stock ownership as urged here by Petitioners.

[24]Copperweld and Regal relied on their separate legal existence to avoid liability in *Ayers* v. *Copperweld Corp.*, 487 F. Supp. 593 (S.D. Tx. 1980), where the court granted Copperweld's motion to dismiss stating that the plaintiff had failed to establish "such degree of control" of Regal by Copperweld to justify disregarding their legal separateness. *Id.* at 594. In fact, when it was to Copperweld's advantage, it invoked the parent-subsidiary conspiracy theory to attempt to block a hostile takeover. *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 594 (W.D. Pa. 1975).

requests to reconsider the corporate distinction under many other statutes as well. Congress has spoken clearly in the antitrust area, and any request for a change in that policy must properly be addressed to Congress.

II. The Exclusion of a Competitor Thereby Eliminating Price Competition and Reducing Product Supply Constitutes an Unreasonable Restraint of Trade.

The second question presented by the Petition involves neither a purported conflict among the circuits nor any alleged inconsistency with a holding of this Court. Instead, Petitioners argue that the court below did not require a sufficient showing of their "market power," despite the substantial evidence of an adverse effect on competition resulting from their exclusionary activities. (Petition at 22) The evidence demonstrated not only that a competitor was excluded by Petitioners' acts, but that such exclusion resulted in a substantially diminished product supply and a preclusion of significant price competition. Such adverse competitive effects have long been held sufficient to establish an unreasonable restraint of trade under the Sherman Act. *See, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-96 (1978).

The jury was instructed that exclusion of Respondent from the market alone was insufficient to establish a violation of Section 1 of the Sherman Act. The jury was required to find an adverse effect on competition within the market as a whole, such

as a decrease in product supply or an effect on prevailing prices. (T. 8461-62, 8477-80)[25]

Petitioners do not contest the sufficiency of the evidence with respect to the substantially adverse impact on price and supply which resulted from their acts. Rather, they ask the Court to adopt a wholly new formulation of the rule of reason which would preclude the finding of a Sherman Act Section 1 violation where defendants fail to possess some undefined level of "market power."[26] Here, the evidence demonstrated that defendants possessed sufficient "market power" to exclude plaintiff from the market, to cause prices to remain high and to restrict supply. It is hard to conceive what greater evidence of market power should be required under Section 1 of the Sherman Act.[27]

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[25]The jury was further instructed to consider "the nature and economic conditions of the relevant market" and "facts which may be peculiar" thereto in language that tracks this Court's rule of reason formulation in *National Society of Professional Engineers, supra*, 435 U.S. at 682. (T. 8478) Thus, the jury was not precluded from considering evidence of market structure or market shares. Moreover, Petitioners failed to tender any proposed instruction concerning market power, and, as the Seventh Circuit pointed out, the trial court's remarks "did not forbid closing argument and instructions on market share." 691 F.2d at 322 n. 20; App. A-21. In fact, Petitioners' trial counsel declared in the jury instruction conference that effect on price was the *only* way to show adverse effect on competition. (T. 7292)

[26]If Petitioners intend to use the term "market power" to mean "monopoly power" as defined under Section 2 of the Sherman Act, then their position amounts to nothing less than a request that this Court repeal Section 1 of the Sherman Act.

[27]Petitioners presented the startling argument in the Court of Appeals that a firm precluded from market entry could not establish an antitrust violation unless it could show that defendants increased their market shares by preventing such new entry. (Appellants' Court of Appeals Brief, pp. 47-49) Petitioners now castigate the Seventh Circuit as "particularly in error" in rejecting this argument as making "no sense in a foreclosure case." (Petition at 23)

Petitioners are unable to support their novel market power approach with any authority under the Sherman Act and therefore turn to cases under Section 7 of the Clayton Act, 15 U.S.C. §18. It is clearly inappropriate to import principles derived under that entirely different statutory standard, but even those principles provide no support for Petitioners' position.[23]

As suggested in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974), the potential competition doctrine under the Clayton Act is designed to ascertain whether removal of a potential entrant has competitive significance by determining whether participants in the market "fashion their behavior to take into account the presence of a potential entrant." (Petition at 24) In the present case, it is clear that Regal feared Independence would be a "price cutter" and did so "fashion" its behavior when it began to moderate its prices over six months before Independence entered, so as not to "make it easy for Independence Tube to enter the market." (PX 43; T. 1308) The evidence also established that Regal operated in a market with "few competing companies" which were "similar to Regal in size" and which tended toward stable pricing and high profit margins. (PX 34; T. 2479-84) Independence thereby exerted a pro-competitive effect on competition in a concentrated market even before its entry, and when it did enter, it further heightened price competition and expanded supply.

Thus, even if Clayton Act principles were applied in this Sherman Act case, Petitioners' activities would be held unlawful. Petitioners present neither a rational basis for creation of a new rule of reason formulation nor any other basis for further review.

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[23] In the Clayton Act context, courts generally must attempt to predict future effects of a merger, and "market power" is a tool to assist in that prediction. Under Section 1 of the Sherman Act, the appropriate inquiry is whether injury to competition has in fact occurred. Here the evidence demonstrated such actual effects.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

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INDEPENDENCE TUBE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. Introduction

At the Court's invitation, the Solicitor General has filed a brief setting forth the government's view that the petition for a writ of certiorari should be granted in this case with respect to the first question presented by the petition, *i.e.*, whether affiliated corporations are capable of engaging in a "contract, combination . . . or conspiracy, in restraint of trade" under Section 1 of the Sherman Act (15 U.S.C. § 1).

The government acknowledges that the second question presented by the petition, whether injury to competition was established, does not warrant review. (Brief of United States as Amicus Curiae, at 3-4 n.8; hereinafter "GB"). Thus, the government concedes that the activities of petitioners here resulted in an unreasonable restraint of trade to the ultimate detriment of consumers. Yet, in the current administration's zeal for retrenchment of antitrust enforcement, it urges the Court to create a new rule of law holding that such an unreasonable restraint of trade is lawful under the antitrust laws.

The government's quarrel is not with the lower court's decision in this case, but with the numerous and consistent holdings of this Court on the parent-subsidiary issue throughout the 93 year existence of the Sherman Act. The Solicitor General's brief asks the Court to overrule at least four of its decisions over the past 35 years. (GB, at 8-11, 22) Contrary to the government's assertions, those decisions are in complete accord with congressional intent and are not a source of confusion or inefficiency. Moreover, the government's current view is a complete repudiation of the position consistently implemented for many decades by both the Justice Department and the Federal Trade Commission. The creation of such a rule reducing Sherman Act coverage would be a radical departure from national antitrust policy which could only be mandated by Congress.

II. The Government's Position Contravenes Congressional Intent.

As the government recognizes, "concerted conduct is prohibited under Section 1 whenever it constitutes an unreasonable restraint of trade . . . ." (GB, at 4) The government argues, however, that "concerted conduct" should *never* be found to exist between parent and subsidiary corporations. This assertion is based upon the erroneous and unsupported notion that a

parent and subsidiary should *always* be regarded as a single economic unit for Sherman Act purposes regardless of how autonomously they operate. The government's argument is without legal foundation or logical support.[1]

Without citation to any legislative history, the government contends that the statutory scheme of the Sherman Act supports its position. Thus, the government argues that Section 1 is concerned with "concerted conduct" while Section 2 is concerned with "unilateral" action, and that parent-subsidiary actions should always be considered unilateral conduct. (GB, at 4-6) The government's argument is in conflict with legislative history and with the consistent holdings of this Court and all lower courts that parent-subsidiary actions can constitute "concerted conduct." Moreover, the "statutory scheme" of the Sherman Act does not support the government's position. Sections 1 and 2 of the Sherman Act are *both* concerned with concerted activity. While Section 2 is *also* concerned with individual monopolistic conduct, it is not so limited.[2] Thus, in their fervor to persuade the Court to imbed into antitrust law an economic notion currently in vogue with some individuals in the Antitrust Division, the proponents seek to rewrite the Sherman Act and its legislative history.

In adopting Section 1 of the Sherman Act, Congress clearly intended to prohibit unreasonable trade restraints perpetrated by affiliated corporations. Thus, Congress specifically identified the commonly-owned corporations of the commercial trusts to

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[1] The government's notion is also dubious as an economic proposition. For purposes of economic analysis, the term "economic unit" is defined as "a firm *or subunit of a firm* that has sufficient resources and autonomy to act on its own behalf in the market place." R. RUMELT, STRATEGY, STRUCTURE AND ECONOMIC PERFORMANCE 33 (1974) (emphasis added).

[2] Section 2 of the Sherman Act prohibits monopolization or activities of a person to "combine or conspire with any other person or persons to monopolize . . . ," (15 U.S.C. § 2)

be within the intended purview of the statute.[3] Moreover, in perhaps the first case to arise under Section 1 of the Sherman Act challenging the conduct of a parent and its subsidiaries, this Court held that corporations affiliated through common ownership were covered by Section 1 of the Act. *Northern Securities Co.* v. *United States*, 193 U.S. 197, 327 (1904). (*See generally* Respondent's Brief in Opposition, at 9.)

Until today, federal antitrust authorities have consistently concluded that conspiracies between parents and subsidiaries can have serious anticompetitive consequences. Indeed, the parent-subsidiary cases in this Court were largely initiated by the United States.[4] Since 1955, the Report of the United States Attorney General's National Committee to Study the Antitrust Laws has been the touchstone of the government's position on this issue.[5] During those twenty-eight years, the Antitrust Division has filed numerous actions alleging Sherman Act conspiracies between affiliated corporations. In *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), former Solicitor General (now Judge) Bork fervently supported this Court's holdings on the parent-subsidiary issue when he argued

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[3] Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & Econ. 7, 21-22 (1966). *See also* 21 CONG. REC. 2457 (1890) (Statement of Senator Sherman), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 116-18 (1978).

[4] *See, e.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). *See also Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1 (1911); *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904).

[5] That Report concluded that "concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1 . . . ." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 34 (1955).

to this Court on behalf of the government that it is improper "to ignore the separate corporate identities of independent firms and permit them to evade liability on the claim that they are a single entity." Brief For The United States, at 28.

In furtherance of this enforcement policy, criminal actions have been filed in appropriate circumstances. *See, e.g., United States* v. *Cotton Baking Co.*, 513 F. Supp. 223 (M.D. La. 1981). Indeed, even the present Antitrust Division recently filed two actions which named affiliated corporations as co-defendants and co-conspirators. *United States* v. *Cambridge-Lee Industries, Inc.*, No. 83-00107 (E.D. Pa. filed March 18, 1983); *United States* v. *Danilow Pastry Co., Inc.*, No. 82 Civ. 3696 (S.D.N.Y. filed June 4, 1982), *proposed consent decree filed* April 5, 1983, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,832.

Assistant Attorneys General in charge of the Antitrust Division have unequivocally supported the Attorney General's Report. For example, in 1967 in connection with the filing of *United States* v. *General Tire & Rubber Co.*, Civil No. 67-155 (N.D. Ohio filed March 2, 1967), Assistant Attorney General Donald F. Turner stated:

> [A]s the law has developed in this area it has been thought appropriate to apply the conspiracy concept to the activities of a group of closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders.[6]

In 1971, Assistant Attorney General (later Judge) Richard W. McLaren set forth the Antitrust Division's enforcement position in similar terms:

> The Department of Justice has adopted a policy of using the intra-enterprise conspiracy doctrine to challenge,

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[6] Interview with Donald F. Turner, Assistant Attorney General, Antitrust Division, 34 Antitrust L.J. 113, 123 (1967).

> under Section 1 of the Sherman Act, practices engaged in by commonly-controlled firms only where the practice has a coercive or restrictive effect on outsiders.
>
> * * * *
>
> [W]e have limited our use of the intra-enterprise doctrine to situations in which the commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities. See, *e.g., United States* v. *General Tire Co., et al.*, D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions. Such an approach is also consistent with the analysis of the case law made by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) p. 34.[7]

The Justice Department's Antitrust Guide for International Operations, adopted in 1977, reaffirmed the Department's long-established view that the Sherman Act applies to "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 12 n.26 (1977).

The government does not now contend that there is any new empirical knowledge or other information which should cause Congress, the administration or the Court to reverse its position. The arguments set forth by the government are the same arguments considered and rejected by this Court in its prior holdings. Indeed, the current administration's position is largely based on its novel and unsupported view of the statutory scheme of the Act as adopted in 1890. The only change is the identity of the assistant attorney general, who is now requesting the Court to establish a rule of *per se* lawfulness

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[7] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,122, 55,197 (Feb. 22, 1971) (footnote omitted).

for unreasonable trade restraints perpetrated by related corporations. Such a rule would forever remove the discretion of government enforcement agencies to initiate actions to protect the public interest in this area and would deprive private parties injured by such unreasonable restraints of the protection of the antitrust laws.

Ironically, this case clearly exemplifies the type of parent and subsidiary conduct which has been of concern to antitrust enforcers and to the courts. Here, Regal was acquired by Copperweld as a going business in a market in which Copperweld was not involved. Thereafter, Regal retained virtually total control of its operations, functioning as a separate decision-maker, with its own customer and supplier relationships independent of its parent. The separate business relationships maintained by each company permitted them to combine their economic leverage to exclude Independence from the market. The Antitrust Division and the courts repeatedly have held in such cases, that where "commonly-controlled firms have pooled their power in a manner which has adverse competitive effects on independent business entities", Section 1 is applicable. McLaren letter, *supra* note 7, at 55,197. *See also William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982).

III. Exemption of Parent-Subsidiary Conduct from the Sherman Act Could Only Be Granted By Congress.

The government contends that freeing parent-subsidiary behavior from Section 1 of the Sherman Act would not really be an antitrust exemption but a reinterpretation of the statute similar to this Court's action in *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). (GB, at 22) The government's analogy is inapt. *Sylvania* did not involve the question of whether certain practices were covered by the Sherman Act, but whether such practices should be analyzed under a rule of reason or a *per se* approach. Here, the government urges the Court to abandon altogether application of the Sherman Act to parent-subsidiary conduct and to exempt such conduct regard-

less of its adverse effects on competition. This Court has repeatedly held that such major reversals of antitrust law and policy can only be made by Congress. Indeed, as the Court recently stated in *Arizona* v. *Maricopa County Medical Society*, 102 S.Ct. 2466, 2478-79 (1982) (footnote omitted):

> By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative prerogative to amend the law . . . .Congress may consider the exception that we are not free to read into the statute.

See also Illinois v. *Abbott & Associates, Inc.*, 51 U.S.L.W. 4311, 4314-15 (U.S. March 29, 1983); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 51 U.S.L.W. 4275, 4280-81 (U.S. March 21, 1983).

Here the government would have the Court implant its novel economic view into the antitrust laws. This Court has emphasized the "inappropriateness of judicial resolution" in such cases where competing public policy considerations and differing economic theories must be weighed. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981).

IV. The Parent-Subsidiary Conspiracy Doctrine is Sound Antitrust Policy.

Section 1 of the Sherman Act refers to contracts, combinations and conspiracies, thus requiring concerted action by two or more "persons." Section 8 (15 U.S.C. § 7) defines "person", *inter alia*, as a corporation. It is clear from the legislative history that Congress considered "[e]ach corporation . . . a creature by itself."[8] Thus, the threshold question in a Section 1 case is whether the alleged conspirators are separate persons.[9] However, separate legal status is simply the begin-

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[8] 21 CONG. REC. 2571 (1890) (Statement of Senator Teller), *reprinted in* E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 182 (1978).

[9] *See, e.g., Green* v. *Associated Milk Producers, Inc.*, 692 F.2d 1153, 1156-57 (8th Cir. 1982); *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203, 205-06 (5th Cir. 1969).

ning, not the end, of the inquiry. Separate legal persons have been held capable of combining only where they are also functionally separate.

For example, even though an individual corporate employee is a separate legal person, the courts have recognized that since a corporation can act only through its employees, the two legal persons are not functionally separate. However, where the employee acts on his own behalf, outside the scope of his employment, he is operating as a separate person from his employer, and he does have the capacity to conspire with his employer.[10] In contrast, unincorporated divisions are not separate legal persons. Therefore, the initial statutory requirement is not met. Accordingly, courts have uniformly held that divisions lack the capacity to conspire without further inquiry into their functional separateness.

Corporate subsidiaries are separate legal entities. However, as with employee-employer relationships, courts look beyond legal formality to the functional separateness of the parent and subsidiary. Only where, as here, the subsidiary operates as a separate economic unit distinct from the parent have the courts found a capacity to conspire.[11]

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[10] *See Holter* v. *Moore and Co.*, 1983-1 Trade Cas. (CCH) ¶ 65,286, 69,689 n.8 (10th Cir. 1983); *Greenville Publishing Co.* v. *Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

[11] *See, e.g., Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). The government acknowledges that petitioners' claim of conflict among the circuits based on a selective and artificial classification of the cases is incorrect. The government asserts only that cases in two circuits appear to hold "without qualification" that affiliated firms can conspire. (GB, at 12-13) Review of these circuits' opinions does not support the government's contentions. *See, e.g., Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110

(Footnote continued on following page)

In addition to functional separateness, the courts require a showing that the affiliated corporations acted to restrain the trade of third parties and not merely to affect the relationship between themselves. *See, e.g., General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983).[12] The government argues that impact on third parties is irrelevant to the determination of whether there is a plurality of actors. (GB, at 15-16) Yet, it is this very inquiry which addresses the concern expressed by the government regarding the freedom of business to organize in an efficient way. This analysis balances internal organizational concerns with the protection of free markets by finding no conspiratorial capacity where the conduct in question deals with the relationship between the affiliated firms. *United States* v. *Citizens & Southern National Bank, supra.* The government does not

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(Footnote continued from preceding page)

(1975) ("the alleged facts tend to establish" that the affiliated defendants were "operationally two separate organizations."); *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 34 n.49 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978) (court distinguishes between "internal management" and concerted action that "erects barriers to entry by another firm"). The government also ignores the most recent decisions dealing with the parent-subsidiary issue, which evidence a growing consensus among the circuits. *See, e.g., General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983); *White* v. *Hearst Corp.*, 669 F.2d 14, 15-16 (1st Cir. 1982).

[12] The government without citation raises the false spectre of *per se* illegality resting solely on the separate incorporation of affiliated entities. In fact, the courts do not apply a *per se* rule to the joint conduct of affiliated firms. If a parent and subsidiary were unable to effect a restraint of trade through their combined efforts, there would be no violation. Thus, the government's purported concern over possible misapplication of the Sherman Act is without substance. *See Thomsen* v. *Western Electric Co.*, 680 F.2d 1263 (9th Cir.), *cert. denied,* 103 S.Ct. 348 (1982); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir.), *cert. denied,* 103 S.Ct. 57 (1982); *Reisner* v. *General Motors Corp.*, 671 F.2d 91 (2d Cir.), *cert. denied,* 103 S.Ct. 130 (1982).

suggest that Copperweld's legitimate goals for incorporating Regal included driving Regal's competitors out of business. Thus, this Court's holdings do not inhibit organizational efficiency.

The current rule of reason analysis is the antithesis of the *per se* approach urged by the government which would shield all anticompetitive activity of a parent and subsidiary from Sherman Act coverage. The government would have this Court determine antitrust policy on the basis of percentages of paper ownership rather than economic realities. Such an approach improperly elevates form over substance by ignoring the operational independence of the corporate actors.[13]

Adoption of the government's proposed exemption would unleash the very kind of anticompetitive behavior and injury to competition that Congress has sought to prevent, without any measurable benefits to the consumer. In this case, for example, the petitioners' joint efforts resulted in a substantially adverse impact on competition, inflated prices and decreased product supply. It is this kind of activity that the government urges this Court to sanction through granting the petition in this case.

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[13] The present standard does recognize the extent of ownership as an appropriate factor for consideration, but not as the sole factor as urged by the government. Indeed, in stark contrast to the position urged by the present leadership of the Justice Department, the government set forth the correct standard in its brief to this Court on behalf of the United States in *Citizens & Southern:*

> In determining whether, for purposes of [the Sherman] Act, corporations are independent entities or mere corporate shells or divisions of the same entity, this Court has looked to the fundamental policies being vindicated as well as the indicia of corporate independence.

Brief For The United States, at 30.

V. Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION AND REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The American Iron and Steel Institute ("AISI") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief as amicus curiae. The consent of counsel for the petitioners has been obtained. The consent of counsel for the respondent was requested but refused.

As described in the brief (*infra*, pp. 1, 2), AISI is a non-profit trade association whose members include 63 domestic companies engaged in the manufacture and sale of iron and steel products within the United States. The domestic member companies of AISI account for approximately 90 percent of the raw steel produced in the United States.

AISI has an interest in having this Court review the decision below. The intra-enterprise conspiracy doctrine, which allows federal antitrust suits to be brought when a plaintiff can identify a "conspiracy" between a parent corporation and its wholly-owned subsidiary, creates difficult problems for AISI member companies and their legal counsel. AISI member companies commonly use subsidiaries for a variety of business reasons. For example, six of the largest AISI member companies have a total of 145 wholly-owned subsidiaries. Therefore, AISI member companies face regularly the uncertainty caused by the current state of the intra-enterprise conspiracy doctrine.

AISI believes that the intra-enterprise conspiracy question presented here can be resolved in a way that is predictable in operation and commensurate with the policies underlying the antitrust laws. Because it represents the interests of a number of companies who face intra-enterprise conspiracy problems in a wide variety of contexts, AISI is in a position to present to this Court the broader problems the doctrine presently poses for the business community.

For these reasons, the motion for leave to file the attached amicus curiae brief should be granted.

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February 1983

QUESTION PRESENTED

AISI believes that the question presented is stated adequately in the Petition:

> Is a parent corporation capable of conspiring with its wholly-owned subsidiary in violation of Section 1 of the Sherman Act?

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMERICAN IRON AND STEEL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

The American Iron and Steel Institute ("AISI") is a New York not-for-profit corporation whose members include 63 domestic companies engaged in the manufacture and sale of iron and steel products within the United States. AISI includes among its members Copperweld Corporation, one of the petitioners in this case. The domestic member companies of AISI (all of which are listed in the Appendix to this brief) account

for approximately 90 percent of the raw steel produced in the United States.

Copperweld is not unique among AISI members in conducting its various lines of business through separately incorporated subsidiaries. AISI member companies commonly use subsidiaries for a variety of business reasons. For example, six of the largest AISI member companies have a total of 145 wholly-owned subsidiaries.

Thus, AISI members face regularly the uncertainty caused by the intra-enterprise conspiracy doctrine. For these companies and their counsel, the fact that "[t]he cases, commentary and settled practices [under the doctrine] are in disarray"[1] is no mere academic problem. In organizing or purchasing a new enterprise, the practical benefits of separate incorporation must be weighed against increased risks of antitrust liability. In assessing corporate plans or conduct, rules on what conduct constitutes an "intra-enterprise conspiracy" must be consulted, and the risk that normal communication, coordination, and decisionmaking in a multi-company enterprise may be characterized as a conspiracy must be assessed. The uncertain state of the intra-enterprise conspiracy doctrine makes difficult the decisions that must be taken regarding these important practical issues.

In the 30 year span between the first involvement of an AISI member company in an intra-enterprise conspiracy case (*Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951)) and the most recent (the decision below), intra-enterprise conspiracy lawsuits, inconsistent formulations of the doctrine, and essentially arbitrary results have all been on the increase.[2] Consequently, so have the problems created for companies like the members of AISI who wish to organize their enterprises efficiently, conform their conduct to the law, and protect themselves from treble damages.

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[1] Sullivan, *Handbook of the Law of Antitrust* § 114, at 323 (1977).

[2] Since *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), there have been 190 reported decisions involving the intra-enterprise conspiracy doctrine. A compendium of the decisions appears in Appendix H to the Petition.

STATEMENT OF THE CASE

In 1972, Copperweld bought an unincorporated division of Lear Siegler, Inc., that made structural steel tubing. Copperweld made the division into a wholly-owned subsidiary, called the Regal Tube Company. Copperweld and the subsidiary were the defendants below, and they are the petitioners here.

David Grohne ran Regal when it was a division of Lear Siegler. After the sale of the division, he set up his own company to manufacture structural steel tubing. This company, Independence Tube Co., was the plaintiff below and is the respondent here.

Copperweld had negotiated a non-competition agreement with Lear Siegler in connection with the sale, but the agreement did not cover Grohne personally. Copperweld sent letters to Grohne's potential suppliers informing them of the possibility of litigation if Grohne used Regal's proprietary information or technology. The Yoder Company then refused to supply a tubing mill that Independence had ordered. Independence found a substitute supplier, but there was a delay in delivery of an operational mill, and this delay was the damage alleged by Independence in a suit brought in the United States District Court for the Northern District of Illinois.

On these facts, a jury found that, under state tort law, Copperweld—but not Regal—was guilty of interference with contractual relations, and found that, under Federal antitrust law, Copperweld and Regal were guilty of a conspiracy in restraint of trade. On the issue of the capacity of Copperweld and Regal to conspire, the jury was instructed to decide whether Copperweld and Regal were a "single economic entity" and to base their decision on all the facts which they, the jury, found to be relevant. While stressing that the jury "must consider all of the facts," the district court directed particular attention to a list of nine factors which it had constructed specifically for this case. The "extent of integration of ownership" was not specifically identified as a factor.

The district court also instructed the jury that Independence's antitrust injury was identical to its injury from the

state tort claim of interference with contractual relations. The jury set the tort damages at $2,499,009, and the district court trebled these damages because of the "conspiracy" between Copperweld and its wholly-owned subsidiary. The state tort law claim and the award of compensatory damages are not at issue here.

On appeal by Copperweld and Regal, the Seventh Circuit affirmed. It recognized the "almost uniformly critical" academic assessment of the intra-enterprise conspiracy doctrine; it acknowledged that commentators conclude that private plaintiffs use the doctrine to attack "basically unilateral action" which does not offend Section 2 of the Sherman Act; and it admitted that the test it endorsed remained "unsettled" and open-ended. Nonetheless, the court of appeals reasoned that the decisions of this Court precluded a wholesale reexamination of intra-enterprise conspiracy doctrine and expressed hope that its "fact-bound," "inferential," open-ended test would be "refined" over time and the "uncertainties . . . obviated."

REASONS FOR GRANTING THE WRIT

1. The Current Confusion In Intra-Enterprise Conspiracy Doctrine Can Only Be Remedied By This Court.

This Court's 1947 decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), has been taken to establish a "rule" that "common ownership and control does not liberate corporations from the impact of the antitrust laws." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). The heart of the problem is that nobody knows how broad the *Yellow Cab* rule really is or to what range of situations—no matter how far removed from the facts of *Yellow Cab*—the rule will apply. Each of this Court's subsequent decisions endorsing the rule[3] involved special facts that would

[3] *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

justify decision on some narrower basis.[4] Various later cases suggest some limitations to the broad doctrine.[5] None of this Court's decisions, however, provides a competitive rationale or a workable standard for determining which parent-subsidiary relationships may be characterized as "conspiracies".

Without additional guidance from this Court, the lower courts have been unable to apply the doctrine in a consistent fashion. The multiplicity of lower court tests, standards, and factors presents a situation where business torts may become treble damage antitrust violations, neutral management arrangements may become incriminating factors, and juries are often left to decide when it is "sensible"—presumably from the viewpoint of antitrust policy—to regard a parent corporation and its wholly-owned subsidiary as a "single economic entity" or as co-conspirators. While this situation contributes to the leverage of private plaintiffs, there is no public policy benefit which justifies the practical costs of unpredictability and of the ensuing unnecessarily frequent and complex antitrust litigation.

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[4] Thus, *Kiefer-Stewart* can be understood as simply a case of coerced vertical price-fixing. Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 45 (1968). In *Perma Life*, this Court identified an alternative basis for liability — namely, that there was an illegal "combination between [defendants] and [plaintiff], as of the day he unwillingly complied with the restrictive franchise agreements." 392 U.S. at 142. And *Timken* has been explained as a horizontal conspiracy between independent companies which "could not be saved by a subsequent stock affiliation." United States Department of Justice, 1977 *Antitrust Guide for International Operations* at 12. *See also* Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 726 (1977). In sum, there is much truth in the Seventh Circuit's characterization of the *Yellow Cab* rule as "sweeping dicta." 691 F.2d at 318. There is nothing to indicate that this Court intended in *Yellow Cab* or in any of the subsequent cases that the rule should be applied in the case of a parent and a wholly-owned subsidiary where the subsidiary is simply the arm or agency through which a business is conducted, a business not otherwise conducted by the parent—that is, a situation where there is no aggregation of capacity or market power.

[5] *See United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *see also Kiefer-Stewart*, 340 U.S. at 215.

2. The Various Approaches Of The Lower Courts Provide No Consistency Or Predictability.

The indeterminate "all the facts and circumstances" approach to capacity to conspire, which the Seventh Circuit used below, is only one of several inconsistent approaches used in the lower courts. As the Eighth Circuit has stated: "The circuits . . . do not agree on the limits of [the] intra-enterprise conspiracy doctrine." *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981).

Moreover, the circuits do not even agree on what sort of an issue a claim of intra-enterprise conspiracy presents. Some circuits use a rule which focuses on the status of the corporate entities, i.e., as a matter of law, the mere fact of separate incorporation provides a plurality of actors.[6] Other circuits, like the Seventh, use an approach which focuses on operational details, i.e., these courts examine all the facts and circumstances surrounding the day-to-day working relationships and communications between commonly-owned corporate entities to determine whether they operate as a "single economic entity."[7] Other courts assess the challenged conduct, i.e., the relevant

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[6] The First, Third, and Fifth Circuits have held, as a matter of law, that a parent and its wholly-owned subsidiary automatically provide the plurality of actors required by Section 1. *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978).

[7] The Seventh, Eighth, and Ninth Circuits have held that separately incorporated but related corporations that function as a single economic unit cannot conspire, but that issue requires an analysis of "all the facts and circumstances" regarding the corporations' inter-relationships. *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587-90 (8th Cir. 1981); *Thomsen v. Western Electric Co.*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982).

inquiry is whether the conduct is "internal" or "external."[8] Yet others focus on the competitive relationship between the alleged "conspirators," i.e., whether the corporations hold themselves out, or actually function, as competitors may or may not be considered important.[9]

Corporate counsel cannot be certain which circuit would be the forum for an intra-enterprise conspiracy challenge. Consequently, when faced with these "tests" and others,[10] corporate

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[8] "This . . . test has been criticized as vague and unworkable." Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 673 n.70 (1982); *see Ogilvie*, 641 F.2d at 588 n.20. The 1955 Attorney General's report took the position that the intra-enterprise conspiracy doctrine should apply to agreements that impose "coercive restraint[s on] the trade of strangers to the corporate family." Report of the United States Attorney General's National Committee to Study the Antitrust Laws 34 (1955).

[9] Several cases have indicated that whether a parent and a subsidiary hold themselves out, or actually function, as competitors is important. *See Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-44, 1046 (E.D. Mich. 1976); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 572-73 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 & n.6 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). Other cases either ignore or attack this point as a consideration. *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511 (3d Cir. 1976) (In rejecting defendants' contention that a parent and a wholly-owned subsidiary cannot conspire unless they have held themselves out as competitors, the court stated: "[W]e find the absence of any appearance of competition between the defendants irrelevant to their potential Sherman Act liability.") A number of circuits have rejected the actual competitor test. *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 44 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *see also TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1260 (8th Cir. 1972) (indicating doubt whether actual competitor test limits the intra-enterprise doctrine); *Diehl & Sons v. International Harvester Co.*, 426 F. Supp. 110, 117 (E.D.N.Y. 1976) (rejecting actual competitor test).

[10] The Fourth and Ninth Circuits have endorsed the "sole decision-maker" rule which holds that there is no capacity to conspire when affiliated corporations are owned and controlled by one person who has the power to make decisions as to both. *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F. 2d 797 (4th Cir. 1951); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

counsel do not have an adequate basis upon which to frame their advice.

3. None Of The Current Formulations Of The Doctrine Is Workable In Practice Or Consistent With Antitrust Policy.

None of the various formulations of the intra-enterprise conspiracy doctrine is satisfactory. The "all the facts and circumstances" test used by the Seventh, Eighth, and Ninth Circuits casts an important issue of law and policy as a purely factual issue for the jury. The fact issue is described as whether the conspirators are a "single economic entity" based on all the facts that are "relevant" in the particular case. The concept of "single economic entity" is amorphous in itself, and when it is defined in terms of the evidence "relevant" to defining it, the whole inquiry becomes circular. This "test," which involves consideration of "various unranked factors" on a "list [that] will expand or contract," 691 F.2d at 318, gives a jury free rein to assess treble damages for what is essentially unilateral conduct. Because this "test" will, necessarily, be applied haphazardly, it offers inadequate guidance. And, although the court below suggested that "the uncertainties that necessarily exist now will be obviated as the test is applied and refined," *id.*, there is little cause for such optimism. An ad hoc, "variety of factors," test, which is divorced from antitrust policy, is an inadequate basis upon which to build coherent doctrine.

At the other end of the spectrum, the First, Third, and Fifth Circuits follow a formal, absolute rule: separate corporations are capable of conspiracy despite their degree of common ownership or affiliation. This rule is neither rational in policy terms nor as predictable as it may seem. "The business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." Areeda, *Antitrust Analysis* ¶ 334, at 399-400(3d ed. 1981).

Although the absolute rule provides a clear answer to the "capacity" question, it has resulted in a lack of clarity as to illegality. Because the rule is overbroad, some courts have devised special rules which focus on the challenged conduct. Indeed, the internal/external inquiry can be understood as an awkward attempt to avoid the unwarranted imposition of antitrust liability on unobjectionable everyday conduct in a multi-corporate enterprise.

The other tests—*e.g.*, the holding out or the sole decisionmaker tests—do not even purport to be "rules" in any formal sense. That is, there is no circuit which consistently applies these tests to the broad range of intra-enterprise conspiracy problems. As a result, depending on the facts presented, a particular court may or may not choose to invoke one of these tests. And, because these tests are applied in an ad hoc fashion, they offer little guidance.

4. This Court Should Adopt The Rule Suggested By Petitioners.

The rule suggested by petitioners offers this Court an opportunity to reconcile the broad statements of *Yellow Cab* with the central perception of *Sunkist* that "grave legal consequences [should not be imposed] upon organizational distinctions that are of *de minimis* meaning and effect. . . ." 370 U.S. at 29. An approach based upon ownership and legal control would bring about greater predictability and eliminate a situation in which antitrust liability can rest on the formality of whether a company chooses to operate through separately incorporated subsidiaries or through divisions.

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court faced a similar problem: the legality of various distribution arrangements had come to rest largely upon distinctions between "sale" on the one hand and "consignment" or "agency" on the other. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). By attaching greater risks to one form of operation than to the other, the antitrust laws skewed business choices with a risk factor unrelated to "competition based on efficiency." *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616,

633 (1975). Lower court decisions created many exceptions to this flat but irrational rule.[11] In a similar fashion with the intra-enterprise conspiracy doctrine, this Court's "sweeping dicta" in *Yellow Cab* and the subsequent confusion in the lower courts have left businessmen with a legal "standard" which is both unpredictable and unrelated to antitrust goals. Thus, the need and the opportunity are the same as in *GTE*: to provide much-needed guidance by adopting an approach that reflects antitrust principle and competitive reality. The approach should also provide reasonable certainty as to the types of organizational form and business conduct that will run afoul of the doctrine.

At the outset, this Court should make one thing clear: a parent and a wholly-owned subsidiary should, as a matter of law, be incapable of conspiring. In such a situation, there is a complete unity of interest, and the only basis for a "conspiracy" finding is a factor—organizational form—that is irrelevant to antitrust policies.

An approach based on ownership or control would have the virtue of making antitrust analysis turn on competitive effects instead of form. Substantially anticompetitive unilateral behavior "should be addressed by reconsidering the rules governing unilateral behavior rather than pretending that unilateral behavior is conspiratorial. Furthermore, the unilateral behavior that ought to be controlled should be controlled without regard to the fortuitous fact of separate incorporation." Areeda, *supra*, at 401. Adoption of this rule would eliminate the haphazard imposition of penal measures (i.e., treble damages) for conduct that, at best, would otherwise entitle a plaintiff to compensatory damages under state tort law.[12]

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[11] *See* ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* (1977); Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 Antitrust L.J. 537 (1975).

[12] "In recent years, antitrust litigation has been characterized by the efforts of private parties to fit within the contours of Section 1 of the Sherman Act conduct which consists of 'garden variety' unfair competitive practices normally reachable under state rather than federal law." Hutter, *"Dirty Tricks" and Section One of the Sherman Act: Federalizing State Unfair Competition Law*, 18 B.C.Indus. & Com.L.Rev. 239, 239 (1977) (footnotes omitted). *Cf. Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1392 (9th Cir. 1982) (Kennedy, J., dissenting), *petition for cert. filed*, 51 U.S.L.W. 3075 (U.S. Aug. 2, 1982) (No. 82-174).

This case affords this Court an opportunity to establish a straightforward rule that would be easily understood by businessmen, judges, and juries. Adoption of the rule suggested by petitioners would reduce dramatically the current adverse impact of the intra-enterprise conspiracy doctrine on business planning and judicial administration.[13]

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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February 1983

[13] This Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), came only a year after this Court's first interpretation of amended Clayton Act § 7 in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), which had announced a "variety of factors" type test for illegality. In explaining the much simpler *Philadelphia* test, Justice Brennan stated: "[I]n any case in which it is possible, without doing violence to the congressional objective embodied in [Clayton Act] § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *United States v. Philadelphia National Bank*, 374 U.S. at 362.

APPENDIX

American Iron and Steel Institute

Domestic Company Members

Allegheny Ludlum Steel Corporation
AL Tech Specialty Steel Corporation
American Cast Iron Pipe Company
Armco Inc.
Atlantic Steel Company
The Babcock & Wilcox Company
Bekaert Steel Wire Corporation
Bethlehem Steel Corporation
Bristol Metals, Inc.
Carpenter Technology Corporation
CF&I Steel Corporation
Charter Manufacturing Company, Inc.,
Charter Rolling Division
The Cleveland-Cliffs Iron Company
Columbia Tool Steel Co.
Consolidated Metals Corp.
Continental Copper & Steel Industries, Inc.
Copperweld Corporation
Cyclops Corporation
Electralloy Corporation
A. Finkl & Sons Co.
Florida Steel Corporation
Green River Steel Corporation
The Hanna Mining Company
Harsco Corporation
Ingersoll Johnson Steel Company
Inland Steel Company
Intercontinental Metals Corporation
Interlake, Inc.
The International Metals Reclamation Company, Inc.
(INMETCO)
Jessop Steel Company
Jones & Laughlin Steel Incorporated
Earle M. Jorgensen Company

Joslyn Stainless Steels, Division of
Slater Steel Inc.
Kaiser Steel Corporation
Keystone Consolidated Industries, Inc.
Korf Industries, Inc.
Laclede Steel Company
Lone Star Steel Company
Lukens, Inc.
McLouth Steel Products Corporation
National Steel Corporation
North Star Steel Company
Northwestern Steel and Wire Company
Oglebay Norton Company
Oregon Steel Mills, Division of
Gilmore Steel Corporation
Phoenix Steel Corporation
Pickands Mather & Co.
Raritan River Steel Company
Republic Steel Corporation
Roblin Industries, Inc.
Rome Strip Steel Company, Inc.
Sandvik, Inc.
Sharon Steel Corporation
Sharon Tube Company
Shenango Incorporated
Teledyne Vasco, Division of
Teledyne Industries, Inc.
The Timken Company
Union Electric Steel Corporation
United States Steel Corporation
Valley Mould & Iron Company
Washington Steel Corporation
Wheatland Tube Company
Wheeling-Pittsburgh Steel Corporation

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No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States (the "Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari,[1] and in support of its motion states:

1. The Chamber is the nation's largest federation of corporations, trade associations, chambers of commerce and individuals engaged in business and the professions, with an aggregate membership in excess of 235,000. Its

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[1] This motion is necessitated by the failure of the respondent to consent to the filing of the brief; the petitioners have given their consent.

members represent a broad spectrum of business and professional groups, both large and small.

2. One of the Chamber's principal functions is to present its members' views to this Court and the lower federal courts on public issues of concern to the business community, including matters of antitrust law.[2]

3. The issue in this case regarding the intra-enterprise conspiracy doctrine is one of significance and concern to the entire business community. The decision below is merely the most recent in a confusing array of decisions in which courts have struggled to define when a parent corporation's interaction with its wholly-owned subsidiary violates Section 1 of the Sherman Act. The substantial inconsistencies and conflicts among these lower court decisions, and the uncertainty they create, impose substantial costs on the business community by unreasonably interfering with commercial planning decisions. Companies commonly choose to operate through subsidiaries rather than unincorporated divisions to: (a) maximize tax liabilities; (b) accommodate differing personnel policies within a single corporate family; (c) improve management accountability; (d) permit the owners of small companies who sell their businesses to larger companies to retain an interest in their companies; (e) enhance attractive financing of different segments of a business; (f) comply with regulatory policies (*e.g.* requirements for separating banking and investment companies); and (g) cure foreign investment problems by encouraging the participation of foreign shareholders. The consequences of incorporating subsidiaries, as demonstrated by the numerous court decisions based on the intra-enterprise conspiracy doctrine, provide ample support of the need for the Chamber to present its views, on behalf of its membership.

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[2] *E.g.*, *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981); *Weyerhaeuser Co. et al.* v. *Lyman Lamb Co., et al.*, 81-1618, 81-1619, —— U.S. ——, 102 S.Ct. 2232 (May 17, 1982).

4. Because imposition of the intra-corporate conspiracy doctrine exalts form over substance, Supreme Court review and repudiation of the doctrine will enhance both economic efficiency and the overall administration of the antitrust laws.

WHEREFORE, the Chamber respectfully requests that its motion be granted.

Respectfully submitted,

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February 28, 1983

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States (the "Chamber") respectfully refers this Court to the interest articulated in its Motion for Leave to File a Brief *Amicus Curiae*, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

The intra-enterprise conspiracy doctrine,[1] as construed by the court below, has no relationship to the economic and

[1] This *amicus curiae* brief is limited to the question of the capability of a parent corporation to conspire with its wholly-owned subsidiary in violation of the Sherman Act. Moreover, it expresses no opinion as to the liability of the Petitioners under state tort law, which is not raised in the petition.

policy concerns underlying the antitrust laws. The issue is squarely presented by the record below, since the jury expressly found that the only parties to the alleged conspiracy in restraint of trade were Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company ("Petitioners") (Pet. App. at A-6). Thus, the relevant facts concerning this aspect of the case are not in dispute, and absent the intra-enterprise conspiracy doctrine, there would have been no antitrust judgment against the Petitioners.

In the Chamber's view, the intra-enterprise conspiracy doctrine, which developed from broad language in previous decisions of this Court, is characterized by a lack of both sound analysis and antitrust policy consideration. In the lower courts, in particular, application of the doctrine has devolved into a confusing proliferation of inconsistent standards and alternative formulations. This confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability. *See*, Motion Seeking Leave to File this brief, paragraph 3.

The intra-enterprise doctrine has been roundly criticized by Professor Milton Handler, a well-known authority in antitrust law. Indeed, Professor Handler has described the doctrine as a "weird concept," and advocated that it should be repudiated by this Court. Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 25-6 (1981). Professor Handler is not alone. The doctrine has been criticized by other commentators. *See*, Note, *Conspiring Entities Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 667-68 (1982) ("it is inconsistent with antitrust goals to make section 1 liability turn on the firm's choice of organizational form."); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N. Y. U. L. Rev. 20, 21 (1968) ("the net result is

thoroughgoing uncertainty . . . leaving no one able to point with confidence to the location of the boundary between legal and illegal business conduct."); Note, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy*, 14 Duq. L. Rev. 63, 65 (1975) (doctrine is based on "conflicting rationales" with "its scope unclear" and generally "in a state of flux"); McQuade, *Conspiracy, Multicorporate Enterprise, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183 (1955) ("the implication . . . may be that the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units.").

Accordingly, for these reasons, as well as those set forth below, the Chamber respectfully urges this Court to reexamine and repudiate the intra-enterprise conspiracy doctrine which adds nothing of substance to antitrust enforcement, while unnecessarily constraining business options.

I. Review By This Court Is Sorely Needed To Cure the Confusion Created by Previous Decisions of This Court and the Courts Below.

The intra-enterprise conspiracy doctrine is neither rooted in legislation nor established through articulated analyses of antitrust policy and economic consideration. Section 1 of the Sherman Act (Pet. at 2) is silent on the issue of capacity to conspire, while the four decisions of this Court,[2] which are the foundation of the doctrine, provide only sweeping dicta with a minimum of analytical content.

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[2] *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951); *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968).

In the seminal case of *United States* v. *Yellow Cab*, 332 U.S. 218 (1947), the Court was faced with a series of acquisition agreements which brought a substantial share of the taxicabs in several major cities under common control. Noting that "the [corporate] affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete," the Court refused to permit the fact of close corporate integration to shield the controlling interests from the consequences of its aggregate power. *Id.* at 229. Unfortunately, the Court also proclaimed broadly that "a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Id.* at 227.

While the sweeping language of *Yellow Cab* could have been read to mean only that monopoly power can arise as readily from single firm market power, cognizable under Section 2, as from cartelization, cognizable under Section 1, in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), Justice Black elevated the *Yellow Cab* dictum to a broad new "rule," stating that "common ownership and control does not liberate corporations from the impact of the antitrust laws." *Id.* at 215. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598 (1951), and *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), simply reiterated this rule with no attempt at further analysis.

In the absence of an articulated policy rationale, lower courts have attempted to formulate alternative standards for limiting the potential sweep of the Court's broad language, resulting in what has been described as a "progeny of confused and mischievous adjudications." M. Handler & T. Smart, *supra* at 26. While the First, Third and Fifth Circuits follow the dicta literally, the Second, Seventh, Eighth and Ninth Circuits have advanced vari-

ous approaches for narrowing the intra-enterprise conspiracy concept. These limiting doctrines, however, including the sole decisionmaker rule,[3] the nonrestraint of outsider trade rule,[4] and the no holding out of independent competitors rule,[5] make little more economic policy sense than the basic doctrine.[6] Indeed, in the decision below, the Seventh Circuit affirmed an "all factors" test, which merely cast the jury adrift to "consider all of the facts . . . that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other" (Pet. App. at A-47).

In summary, the intra-enterprise conspiracy doctrine is derived solely from overbroad dicta without regard to antitrust policy or economic justification. Because of this lack of analytical content, application of the doctrine in the lower courts has become increasingly confused and arbitrary and tends to distort other aspects of antitrust enforcement. As one commentator has noted, the "current disagreement among the circuits . . . demands resolution by the Supreme Court," *Conspiring Entities Under Section 1 of the Sherman Act*, *supra* at 681.

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[3] *See, Windsor Theater Co.* v. *Walbrook Amusement Co.*, 94 F.Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

[4] *See, e.g., Thomsen* v. *Western Elec. Co.*, 512 F.Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 348 (1982).

[5] *See, e.g., Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F.Supp. 1039, 1045 (E.D. Mich. 1976).

[6] It has been suggested that the lower courts' attempts to limit the application of the intra-enterprise conspiracy doctrine reveal their discomfort with a doctrine that has the capacity to interfere with normal parent-subsidiary relations. M. Handler & T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 38 & 54 (1981). See also p. 7 *infra*.

II. The Intra-Enterprise Conspiracy Doctrine Serves No Legitimate Antitrust Enforcement Purpose.

In sharp contrast to the rampant confusion concerning the capacity of affiliated corporations to conspire, the courts uniformly agree that an unincorporated division is not a separate entity capable of conspiring with its parent corporation for purposes of Section 1 of the Sherman Act.[7] Since, as the court below recognized (Pet. App. at A-9), "there may be little [practical] difference between a wholly-owned subsidiary and a fully integrated division," the intra-enterprise conspiracy doctrine results in arbitrary and economically irrational imposition of antitrust liability based solely on the formality of a subsidiary, as opposed to divisional, corporate structure.[8]

In the Chamber's view, well-developed antitrust principles under Section 2 of the Sherman Act and Section 7 of the Clayton Act already provide ample tools for dealing with market power and competitive behavior of constituent corporate entities under common control. Un-

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[7] *See, e.g., H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[8] In *Perma Life*, the Court implicity recognized the formalistic dichotomy between the treatment of subsidiaries and divisions, but suggested that "since respondents . . . availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities" (392 U.S. at 141-42). The Court's opinion, however, made no attempt to articulate any antitrust policy or economic justification to support such a distinction, nor to reconcile such differential treatment with the admonition in *Yellow Cab* that the Sherman Act "*is aimed at substance rather than form*." 332 U.S. at 227. (Emphasis added.) Instead, the opinion went on to stress that alternative theories of conspiracy were also present, thereby suggesting that the intra-enterprise conspiracy holding was unnecessary on the facts presented.

der such analysis, the mere fact of separate incorporation cannot shield the acquisition of exercise of market power from antitrust accountability. By the same token, however, when aggregate market power under common control is below established Section 2 or Section 7 thresholds, it makes no sense to impose a stricter standard under Section 1 of the Sherman Act merely because that limited power is administered through subsidiaries rather than corporate divisions. Antitrust enforcement can only lose credibility if it is applied formalistically and without consideration of actual economic effects.

Equally important, the sense of unfairness surrounding the intra-enterprise conspiracy doctrine may also distort other antitrust principles. As several courts have already recognized, a special standard for finding conspiracy must obtain in parent-subsidiary situations since "the typically close relationship between the parent and subsidiary could too easily give rise to inferences of conspiratorial activity. Antitrust laws should not deter legitimate consultation between a holding company and its subsidiary with regard to financial planning or the establishment of lawful economic goals to be pursued by the subsidiary." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 57 (1982). The Chamber believes that such efforts to construct new "conspiracy" or "restraint of trade" principles to offset the pernicious effects of the intra-enterprise conspiracy doctrine only compound its harms.

III. The Doctrine Creates Inefficiencies And Unnecessarily Constrains Business Planning.

The sharp conflicts among the circuits in dealing with intra-enterprise conspiracies has created substantial confusion and uncertainty in the business community. Corporations with subsidiaries operating in various parts of the country cannot reasonably anticipate which of the dis-

parate judicial approaches might be applied to their particular circumstances. Such uncertainty increases business risk, which in turn imposes unnecessary costs on the economy. The elimination of this confusion is itself sufficient reason for this Court to repudiate the intra-enterprise conspiracy doctrine and to reconcile the arbitrary discrimination between divisions, and subsidiaries in antitrust matters.

The choice between organizing constituent corporate entities as separately incorporated subsidiaries, rather than divisions, is not purely formal from the standpoint of economic efficiency. For the small businessman and individual entrepreneur, in particular, availability of the option to organize as a subsidiary, rather than in a divisional format, may be critically important. In order to tap broader resources and to realize financial rewards from the creation of a new business, the entrepreneur often seeks to be acquired by a larger established corporation. One favored method to maximize the interests of each party to such a transaction is to permit the original owner to remain active in management and to retain a direct, minority interest in the business. Only a separately incorporated subsidiary can provide the necessary flexibility to achieve these purposes.

Finally, as discussed *supra* at 7, the intra-enterprise conspiracy doctrine jeopardizes normal parent-subsidiary relations once a subsidiary format has been adopted. In the Chamber's view, a parent corporation should not be limited in exploiting legitimate efficiencies of integration within the corporate family. It is both reasonable and desirable for the controlling corporations to coordinate the marketing and pricing policies of its subsidiaries in order to maximize the organization's overall competitive efforts. Such operational economies should not be discouraged by intra-enterprise antitrust risks which serve no antitrust purpose.

CONCLUSION

In summary, the goals of economic efficiency which antitrust policy seeks to preserve, can only be enhanced by this Court's review and repudiation of the formalistic discrimination created by the much criticized intra-enterprise conspiracy doctrine. That doctrine adds nothing of substance to antitrust enforcement and, instead, unnecessarily and uneconomically constrains business options.

The Chamber of Commerce respectfully urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 82-1260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Manufacturers (hereinafter "NAM"), by and through its attorneys, hereby moves this Court pursuant to Rule 36 of the Rules of the Supreme Court for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The NAM has received consent from petitioners, but respondent, through its counsel, has refused consent.

The National Association of Manufacturers is a nonprofit voluntary business association incorporated under the laws of the State of New York representing more than 12,500 manufacturing and related business concerns which in the aggregate account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. In addition, through its Associations Department and the National Industrial

Council, NAM is affiliated with approximately 158,000 businesses, many of whom share our vital interest in a clear and effective antitrust enforcement system in the United States.

The NAM is concerned that the intra-enterprise conspiracy doctrine has developed in the lower courts without sufficient guidance from this Court as to its policy justifications and potential ramifications for the various forms of business organizations. As a result, courts have been inconsistent in their approach and business counselors are uncertain about predicting whether virtually any transaction involving members of a corporate family will be subject to the Sherman Act. With the threat of criminal and treble damage liability riding in the balance, clarification and guidance is essential to the proper functioning of the parent-subsidiary relationship between corporations. Because the details of antitrust law, more than most other areas of statutory law, have been developed through judicial interpretation, Supreme Court review of this issue is particularly important. This case presents an ideal factual foundation for a close examination of the intra-enterprise conspiracy doctrine.

We urge that we be granted leave to file our brief as *amicus curiae* to highlight the important effect of this issue on American industry.

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers (NAM) hereby submits this brief as *amicus curiae* in support of the petition for certiorari to the United States Court of Appeals for the Seventh Circuit. Our interest is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE CASE

The central issue in this case is whether a corporate family can illegally conspire with itself under the antitrust laws. In 1981, a federal court jury found that the Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, had conspired to restrain trade in

the steel tubing market in violation of Section 1 of the Sherman Act. Copperweld and Regal supposedly "conspired" by agreeing to a course of action to protect Regal, and consequently the corporate family, from the possibility that a competitor, Independence Tube Corporation, might infringe upon valuable know-how and trade secret rights. The parent, acting within its power to control its subsidiary, sent letters to potential third party suppliers of Independence. These letters warned that Copperweld intended to take all steps necessary to protect the proprietary rights it acquired when it purchased the Regal Tube Company, and the letters were intended to reduce the chance that a court might refuse to enjoin Independence from the unauthorized use of these proprietary rights because of substantial third party reliance interests. One supplier, The Yoder Company, subsequently cancelled its supply contract with Independence, delaying the latter's entry into the tubing business by nine months.

Independence sued, and a jury found sufficient evidence to conclude that Regal Tube Company was a separate entity for purposes of conspiring with its parent, Copperweld, under Section 1 of the Sherman Act. The judge's instructions provided that the jury consider various factors, including the extent to which the two related companies have separate histories, officers and management, corporate offices, salaries and expenses, operating policies, and customers. The Seventh Circuit upheld the jury's conclusion that the companies were separate enough to be coconspirators despite the fact that: (1) Copperweld owns 100 percent of Regal, (2) Copperweld shares corporate headquarters in Pittsburgh with Regal, (3) Copperweld's Chairman and Chief Executive Officer was also Regal's Chairman and Chief Executive Officer, (4) all of Regal's directors and officers were board members and officers of Copperweld,[1] (5) Copperweld owned the know-how and trade secret rights which it sought to protect by sending

[1] Breedlove Tr. 4875-84.

the letters leading to this litigation, and (6) Copperweld exercised effective control over Regal in the very conduct which formed the foundation for an allegation of separateness between them.

SUMMARY OF THE ARGUMENT

For more than 35 years, the courts have been struggling with differing approaches to the intra-enterprise conspiracy question. A number of courts have said that in some instances a corporation and its own subsidiary are not separate legal entities capable of conspiring together under the antitrust laws. The Supreme Court has looked at the issue several times before, and issued rulings that did not fully address the antitrust policy aspects of the issue. As a result, lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations. Questions arising under the antitrust laws, particularly in this unsettled area, demand resolution by this Court.

ARGUMENT

This Court has had several occasions to consider issues arising from antitrust suits where a conspiracy is alleged between two related corporations or divisions of corporations. Each of the decisions to date has helped guide our understanding of the factors to be considered in determining whether there are, for purposes of antitrust law and policy, more than one "person" acting to restrain competition. However, the lower courts have varied widely in their approaches to this situation in individual cases. The clearest statement of the unity of a corporation for antitrust conspiracy purposes is the principle that two officers of the same corporation can agree on corporate pricing or marketing policies without being liable

for conspiracy.[2] On the other end of the spectrum, two officers from unrelated companies clearly may not reach agreements in these areas without violating section 1 of the Sherman Act. Petitioners' case here involves the area in between these extremes, where officers or agents of two related corporations make agreements that may have significance with respect to competitors in the marketplace.

I. THIS COURT'S PAST DECISIONS RELATING TO INTRA-ENTERPRISE CONSPIRACIES DO NOT DEAL WITH THE FACTUAL SITUATION PRESENTED IN THIS CASE.

The Supreme Court has issued a handful of decisions in the last 35 years wherein it was held that wholly or partially-owned subsidiaries conspired with their parent corporations to restrain trade. Each written opinion has contained only a brief, general statement of the doctrine that corporate family members may be found liable for conspiracies among themselves, but in no instance have the holdings been supported by analysis of any underlying policy. In fact, more detailed explanations have been produced by the Court in cases where it felt compelled to rule that certain intra-enterprise activities were fully protected from liability under the Sherman Act. In addition, those decisions enunciating the broad rule of liability were grounded on fact patterns that indicate some reason for finding antitrust liability other than a conspiracy between a parent corporation and its wholly-owned subsidiary. Moreover, as the facts of the *Copperweld* case indicate that it is sufficiently distinguishable in this area from the facts arising in previous cases decided by this Court, a more complete review of the fundamental principle of intra-enterprise conspiracy and its application to wholly-owned subsidiaries is justified at this time.

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[2] *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

The Seventh Circuit's opinion itself recognizes that the Supreme Court's decisions are far afield from academic discussion of the intra-enterprise conspiracy doctrine.[3] It discounts the "sweeping Supreme Court dicta" as not to be read with complete literalism, yet goes on to apply the dicta in a situation which this Court has not heretofore addressed.

For example, most of the cases decided to date involve a significant degree of competition between the related companies. In *United States v. Yellow Cab Co.*,[4] this Court ruled that the more important taxicab companies in Chicago, New York, and other cities may not avoid violating the Sherman Act by merging together where "the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." The taxicab companies were competitors before merger. The Court's ruling indicates that the act of affiliation itself was deemed part of the conspiratorial act, but says nothing about situations such as the case at bar where the affiliation was made prior to and with no connection to the alleged conspiratorial act. Nevertheless, the statement was adopted in numerous subsequent decisions as the building block for a broader statement of the intra-enterprise conspiracy doctrine.

Thus, in 1948, the Court found that a chain of motion picture theaters had conspired with wholly-owned subsidiaries to monopolize the film distribution network in six states.[5] Relying on *Yellow Cab*, it ruled that the concerted action of the parent and its wholly-owned subsidiaries "was not immunized by reason of the fact that the members were closely affiliated rather than independent."[6]

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[3] 691 F.2d at 317-18.

[4] 332 U.S. 218, 229 (1947).

[5] *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110 (1948).

[6] *Id.* at 116.

In *United States v. Paramount Pictures, Inc.*,[7] decided the same day, the Court also found a restraint of trade where movie theaters were jointly owned by exhibitors who would otherwise have been in competition with each other. The Court gave no justification for these rulings, but once again the issue arose in the context of companies engaged in monopolization or otherwise in direct competition with each other. In other words, there was evidence of some other antitrust violation that helped persuade the Court to find liability.

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[8] the Supreme Court again gave cursory review to the claim that Section 1 of the Sherman Act does not apply to companies acting as "mere instrumentalities of a single manufacturing-merchandizing unit." Referring only to *Yellow Cab's* statement that common ownership and control of corporations does not liberate them from the antitrust laws, the Court found the rule "especially applicable where . . . respondents hold themselves out as competitors."[9] In *Timken Roller Bearing Co.* v. *United States*,[10] the Court again found no reason to exempt from the Sherman Act agreements between legally separate companies "to suppress competition among themselves and others . . . ," assuming that the three affiliated companies would have competed with each other in the sale of antifriction bearings in the U.S., British, and French markets. The case at bar has no possibility of competition similar to that present in both *Kiefer-Stewart* and *Timken*, since the parent Copperweld does not compete with Regal in the manufacture and sale of steel tubing. Thus the rationale of those cases for holding affiliated corporations liable for conspiring to reduce competition between themselves does not apply.

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[7] 334 U.S. 131 (1948).

[8] 340 U.S. 211, 215 (1951).

[9] *Id.*

[10] 341 U.S. 593, 598 (1951).

This Court again ruled in 1968 that a parent and its subsidiaries could conspire under Section 1 of the Sherman Act as long as they are doing business through separate corporations.[11] The Court added that in any event there was a combination between the plaintiff and one corporate defendant that justified an antitrust suit.[12] Again there was no expressed justification for refusing to view members of a corporate family as a single entity under Section 1, and the Court gave no policy reason to support an interpretation of antitrust law that penalizes any corporation that has *any* control over a subsidiary's operations.

The result of this whole line of cases is that any time a corporation has a subsidiary, whether wholly-owned or partially-owned, it is exposed to treble damage liability (and its managers to criminal liability) for having any contact with the competitive decisions of that subsidiary. Any competitor could charge that the contact was an opportunity to effectuate a conspiracy that might lead to some effect on competition or a competitor, even if the parent is not in competition with its subsidiary. The antitrust laws were never intended to create such a situation, yet this conclusion is inevitable unless this Court refines its analysis and clarifies its previous rulings.

II. THIS COURT'S LIMITATIONS ON THE INTRA-ENTERPRISE DOCTRINE SHOULD BE CLARIFIED.

Despite the Court's recurring reference to *Yellow Cab's* generalization on intra-enterprise conspiracies, it has refined its analysis and recognized major exceptions in two significant areas. For example, in 1962, the ruling in *Sunkist Growers, Inc. v. Winckler and Smith Citrus*

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[11] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968).

[12] *Id.* at 142.

Products Co.[13] allows courts to look beyond the technical legal differences between companies to the practical reality of the relationship between companies charged with conspiracy. The Court found that three separately-organized legal entities were in fact one organization or association for purposes of falling within the agricultural exemption of the antitrust laws.[14] The Court said, "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect . . . ." [15] The antitrust laws were never intended to apply to agreements made by employees of an individual entity, and this implied "exemption" for intra-enterprise agreements is just as important an exemption as the express statutory exemption for agricultural organizations. The Court's language cutting through the legal formality of separate incorporation of related companies should apply equally well in other parent-subsidiary situations, especially where the subsidiary is wholly owned.

More recently, in *United States Steel Corp. v. Fortner Enterprises, Inc.*,[16] the issue was whether it was an illegal tying arrangement for the parent corporation and its subsidiary to condition the availability of home development financing from the subsidiary on the purchase of prefabricated houses from the parent. Although the issue on appeal was not whether the parent and subsidiary could conspire together, the case was brought under Section 1 of the Sherman Act, and the Court indicated that the separateness of the legal entities (parent and subsidiary) was irrelevant. "[T]heir common ownership and control make it appropriate to regard the two as a

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[13] 370 U.S. 19 (1962).

[14] Clayton Act, § 6, 15 U.S.C. § 17 (1976).

[15] 370 U.S. at 29.

[16] 420 U.S. 610 (1977).

single seller . . . ." [17] The Court went on to say that the tying arrangement was not illegal because the defendants did not possess sufficient economic power in the credit market. Thus it was not illegal under the Sherman Act for a parent and its subsidiary to agree between themselves to condition the availability of credit on the sale of houses. The Court has since ruled that credit terms are just as much an element of price for purposes of the Sherman Act as is the price itself,[18] yet the Court found no problem with a parent and its wholly-owned subsidiary working together to jointly sell houses and credit in this instance. An agreement between two corporations relating to prices is normally a *per se* violation of Section 1, but the Court disregarded the separateness of the wholly-owned subsidiary here.

Thus the issue is squarely presented. As indicated in petitioner's brief,[19] the lower courts have been struggling for years with legal theories and methods to minimize the harshness of an across-the-board ban on cooperation between a parent and its subsidiary. This struggle has been necessary to develop more fully the policy justifications underlying the Court's apparent rule that the subsidiary relationship is at times irrelevant in a conspiracy analysis. As a result, the courts have adopted various tests with different formulae to determine whether two separately incorporated but related corporations are sufficiently separate to conspire as different entities under the Sherman Act. These circuits have held that a parent and its wholly-owned subsidiaries are separate entities for purposes of conspiracy as a matter of law.[20] Others have

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[17] *Id.* at 613.

[18] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam).

[19] Petition for Writ of Certiorari at 9 & App. H.

[20] *See Columbia Metal Culvert Co. v. Kaiser Aluminum and Chemical Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H & B Equipment Co. v. International Har-*

indicated that the ability of related but separately incorporated firms to conspire depends on the facts, each circuit using varying factors to make this determination.[21] Even the circuit court judges recognize the need for Supreme Court resolution of this problem.[22] The alternative formulations of the intra-enterprise conspiracy doctrine make counseling industry on the legality of proposed activities a mine field of uncertainty.

Since this Court has never made a complete analysis of the intra-enterprise conspiracy doctrine, the policies that should underlie it, or the implications that it carries, this case presents an ideal vehicle to do so. The facts are appealingly straight-forward, inasmuch as the lower court found a conspiracy between a parent and its subsidiary even though there was no area of competition between the two entities,[23] there was a substantial overlap of management officers and directors, and the subsidiary was wholly-owned. If this Court were to rule only on the applicability of the Sherman Act's conspiracy language to activities involving parent companies and their wholly-owned subsidiaries, this would be a major step forward in the ability of lawyers and their corporate clients to

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vester Co., 577 F.2d 239, 244-45 (5th Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[21] *See, e.g., Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), *cert. pending*, No. 82-1260; *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976).

[22] *See Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981) (circuits in disagreement on intra-enterprise conspiracy doctrine).

[23] The Ninth Circuit has indicated that these two factors alone, common ownership and discretion and lack of intra-enterprise competition, arguably make such corporations "incapable of conspiracy." *Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, No. 82-627 (Nov. 8, 1982).

understand what the law is and what impact it will have in a given situation. Without such guidance, there will continue to be a tremendous amount of uncertainty, inconsistency among the circuits, and treble damage judgments in situations that neither Congress nor this Court reasonably expect to result in liability.[24]

III. A STRICT RULE OF INTRA-ENTERPRISE LIABILITY THREATENS THE CONTINUED EXISTENCE OF CORPORATE SUBSIDIARIES.

The use of the corporate subsidiary relationship among NAM members is widespread, and the reasons underlying a corporations' decision to operate its business using separately-incorporated subsidiaries are varied. Separate incorporation provides certain tax, financing, and limited liability benefits, can enhance the ability of companies to negotiate and settle mergers and acquisitions, and can improve management accountability and efficiency. In addition, because of the various financial benefits available to them, separately-incorporated subsidiaries may contribute to economic efficiency, thus enhancing competition in the marketplace and furthering the fundamental goal of the antitrust laws. For this reason, holding a wholly-owned subsidiary liable for conspiracy with its parent under the Sherman Act is in direct conflict with antitrust policy, and should be carefully reviewed to ensure that such conflict does not destroy the proper enforcement of the antitrust laws.

The inconsistencies between the circuits on the intra-enterprise conspiracy question are of particular concern because of the treble damage remedies available to suc-

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[24] By its own language, Section 1 of the Sherman Act requires a conspiracy among more than one party, in contradistinction to Section 2, which applies to any "person." To impose liability under Section 1 on what is in reality a single enterprise would eviscerate Congress' purposeful distinction. *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981).

cessful plaintiffs. While we understand that there will always be some degree of uncertainty in determining in advance whether a particular activity will violate the Sherman Act, this case presents as clearly as possible a situation where the parent had a legitimate financial interest as sole owner of its subsidiary in preserving and protecting its assets. The Supreme Court can aid tremendously in business organizational planning by indicating whether wholly-owned subsidiaries and their parents are capable of conspiring with each other. Without such guidance, companies are left to guess whether the consolidation of corporate offices, the overlap of directors and officers, and the control of 100% of the subsidiary's stock will be enough evidence to justify freedom of action without the fear of antitrust litigation. Where an incorrect prediction by corporate management can change the company's liability from zero to three times any damages resulting from the use of ordinary business judgment, the need for some additional guidance becomes apparent.

If parent and subsidiary corporations are potentially liable under the anti-conspiracy provisions of the Sherman Act, it would be impossible for any corporation to do business in a multicorporate form.[25] Any marketing decision in which an officer or director of the parent company participates could give grounds for a competitor of either the parent or the subsidiary to allege a conspiracy in restraint of trade.[26] Indeed, any decision whatsoever, if it has an impact on the competitiveness of the subsidiary, could lead to an antitrust suit.

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[25] Von Kalinowski, 1 ANTITRUST LAWS & TRADE REGULATION § 601[2][c][ii], at 6-32 (1980). *See* Kintner, *An Antitrust Primer*, at 30 (1964) (predicting that "an inflexible approach requiring competition within a single business unit, although composed of legally separate entities, would introduce chaos, not promote competition").

[26] *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

CONCLUSION

The NAM does not suggest the substantive principles this Court should adopt to determine whether a corporation and its subsidiary, whether wholly-owned or partially-owned, are capable of conspiring in violation of the Sherman Act. Nor do we comment on the remedies that were available in this case under state law. We do, however, feel that the intra-enterprise conspiracy doctrine has not been fully addressed by this Court, and as a result the circuits have not developed a consistent approach. This Court will significantly advance the understanding of antitrust law by those who must comply with them by taking the opportunity presented by this case to reconsider this major issue and to provide further guidance on the policies that should underlie any analysis of an alleged conspiracy involving wholly-owned subsidiaries or other related parties. The wholly-owned relationship in particular presents the best opportunity for the Court to issue a definitive ruling that is easy to apply to the complexities of the business world. We urge this Court to grant a writ of certiorari to the Seventh Circuit in this case.

Respectfully submitted,

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No. 82-1260

In the Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION, ET AL., PETITIONERS

v.

INDEPENDENCE TUBE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether joint activities of corporations under common control should be deemed conduct of a single economic enterprise, rather than conspiracy in restraint of trade within the meaning of Section 1 of the Sherman Act, 15 U.S.C. 1.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1260

COPPERWELD CORPORATION, ET AL., PETITIONERS

v.

INDEPENDENCE TUBE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

STATEMENT[2]

The court below upheld a jury finding that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, conspired to restrain trade in the structural steel tubing market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent Independence Tube Corporation, plaintiff below, alleged that joint actions of the petitioners caused a third company (Yoder) to cancel its contract to provide respond-

[1] The Federal Trade Commission joins in this brief.

[2] Because the petition and the brief in opposition describe the facts and the proceedings below in some detail, we provide only a very brief statement.

ent with a tubing mill, and that as a result respondent was unable to enter the structral steel tubing market until some nine months later than if Yoder had not cancelled the contract.[3] In affirming the jury verdict, the court of appeals relied on a line of this Court's decisions[4] for the proposition that a parent corporation and its wholly-owned subsidiary may be treated as separate entities capable of conspiring within the meaning of Section 1 of the Sherman Act (Pet. App. A10-A11). Referring to a list of factors set out in one of its prior decisions,[5] the court of appeals concluded that the evidence supported the jury's conclusion that petitioners were sufficiently separate to be subject to Section 1 liability for their joint activities (*id.* at A11-A17, A40-A42).

DISCUSSION

The court below held that petitioners, a parent corporation and its wholly-owned subsidiary, constitute separate economic entities for purposes of Section 1 of the Sherman Act, 15 U.S.C. 1, and that their "concerted" conduct directed against respondent therefore violates the Act.[6] That decision, and the intraenterprise conspiracy

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[3] Respondent originally contended that Yoder had conspired with petitioners. However, the jury found that Yoder had not participated in a conspiracy (Pet. App. A6).

[4] These decisions include *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

[5] *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

[6] Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony * * *.

doctrine on which it is based,[7] are at odds with the system of distinct standards Congress has created under the Sherman Act for unilateral conduct, on the one hand, and concerted conduct, on the other. The intraenterprise conspiracy doctrine fails to accord recognition to the fact that corporations under common control, like a corporation and its officers or unincorporated divisions, actually constitute a single economic entity and that coordinated conduct among components of such an entity is the product of common control; it should not be viewed as falling within the category of concerted activity Congress intended to prohibit under Section 1 of the Act. The doctrine has generated considerable litigation and has led to confusion among the federal courts and uncertainty within the business community. Moreover, application of the doctrine to commonly controlled corporations tends to undermine the goals of the antitrust laws. For these reasons, review is warranted so that the Court may consider the intraenterprise conspiracy issue raised in the first question presented by the petition.[8]

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[7] The doctrine of "intraenterprise conspiracy" has grown out of a line of this Court's decisions beginning with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). See note 4, *supra*.

[8] Petitioners' first question refers to the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act. Petitioners' discussion makes clear (Pet. 19-22) that the underlying question is whether Congress intended Section 1 of the Sherman Act to reach joint conduct by commonly controlled corporations.

We believe the second question presented by the petition, which involves the proof necessary to establish injury to competition in a Section 1 case, does not warrant review by this Court. There is no conflict between the decision below and any decision of this Court or of any other circuit. Moreover, there appears to be no clear legal error preserved for this Court's review. The lower courts did not equate injury to a competitor with injury to competition, and the court of appeals was correct insofar as it held that injury to competition does not require a showing that petitioners' market share increased. Petitioners point to no alternative instruction that they requested and the court rejected; indeed, the instruction quoted by the court of appeals appears (Pet. App. A21) to have

1. Under the scheme of antitrust enforcement created by the Sherman Act, Congress has sought to foster independent economic decision making by establishing more stringent legal standards for multiparty conduct than for unilateral action. Section 1 of the Act reaches only conduct in the form of contracts, combinations or conspiracies, and thus does not address unilateral conduct.[9] Concerted conduct is prohibited under Section 1 whenever it constitutes an unreasonable restraint of trade,[10] regardless of whether there is any danger of monopoly. In contrast, under Section 2 of the Act, which does reach unilateral action,[11] there is no violation unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization.[12]

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been similar to one proposed by petitioners (see Brief of Plaintiff and Counter-Defendants-Appellees at SA-7 to SA-8 (Defendants' Revised Instruction No. 34)). Finally, if this Court holds, as we urge it to, that Section 1 does not apply to the conduct at issue, it would not be necessary to reach the second question.

[9] See, *e.g.*, *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 451 (2d Cir. 1982), cert. denied, No. 81-2301 (Oct. 4, 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981).

[10] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). Some forms of concerted conduct, such as horizontal price-fixing and market allocation, will be deemed per se unlawful, without analysis of market structure or market power, because they promise no significant economic benefits. See *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

[11] Section 2 of the Sherman Act, 15 U.S.C. 2, prohibits monopolization and attempts to monopolize, whether by means of unilateral activity or joint conduct. In addition, it prohibits conspiracies to monopolize.

[12] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

Sound policy considerations underlie Congress' distinction in the legal standards applied to unilateral conduct, on the one hand, and multiparty conduct, on the other. The purpose of the antitrust laws is to foster economic well-being by encouraging vigorous competition among individual enterprises. Except in the context of acquisitions, which are subject to a rule-of-reason examination, and also excepting for the moment the doctrine now under discussion, antitrust doctrine wisely does not attempt to control the size or organization of business entities. Size and organization are recognized to be the products of private endeavors to create competitive and hence efficient business entities. The behavior of those entities is then subjected to one or the other of two statutory standards: the comparatively restrictive standard imposed by Section 1 on multifirm behavior, and the substantially more permissive standard imposed by Section 2, which prohibits monopolization. This statutory pattern, and the sound economic policy it reflects, would be undermined if individual enterprises were constrained in their competitive efforts by the threat of antitrust liability, in the absence of a dangerous probability of monopolization.[13] By contrast, Congress' determination to impose a stricter Sherman Act standard on concerted conduct, *i.e.*, to prohibit unreasonable restraints of trade without requiring any danger of monopolization, is consistent with the con-

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[13] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 273-274; *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). Cf. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965).

The courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. See *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953). In addition, state tort or contract law may provide relief for certain types of unilateral conduct that harm competitors. Indeed, in this case the jury found that petitioners had tortiously interfered with respondent's contractual rights. Pet. App. A6-A7.

cern about multiparty conduct reflected in the common law treatment of conspiracies.[14] In addition, it is supported by the recognition that, in a system designed to foster independent economic decision making, there is little reason to tolerate concerted business conduct among rivals unless it involves an integration of resources under common control that holds out the possibility of increased output, lower prices, or other procompetitive benefits that cannot be attained by individual firms.

2.a. This case presents the question whether Congress intended application of the more stringent Section 1 standard to a firm's conduct solely because it chooses to do business through legally distinct, but commonly controlled, corporations, rather than through a single corporation with multiple divisions. The difficulty with the intraenterprise conspiracy doctrine is that it evaluates conduct within a single competitive unit by the stringent standard for conspiracy cases, simply on the basis of an enterprise's choice of corporate form. Thus, under the doctrine, joint action by a parent corporation and its wholly-owned subsidiary, which is not substantively different from unilateral action by a company with unincorporated divisions, is treated as if it were cartel behavior. In some cases, such as refusal to deal with a third party, application of the intraenterprise conspiracy doctrine can have drastic effects; conduct that would otherwise be judged as unilateral, with its legality dependent on whether it raised a danger of monopolization in the particular economic setting, could be viewed as a concerted refusal to deal, and thus per se illegal, when measured under Section 1 conspiracy standards.[15] Use of

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[14] See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *United States* v. *Rabinowich*, 238 U.S. 78, 88 (1915).

[15] The difficulty with the intraenterprise conspiracy doctrine can be appreciated if one views legitimate and efficient unilateral conduct, *i.e.*, that which does not raise a danger of monopolization, as being at one end of the spectrum, with collaborative per se illegal agreement at the other, and all other conduct whose antitrust

the formalistic distinction of separate incorporation to impose the strict Section 1 standard on what is essentially single-firm behavior is inconsistent with the principle of economic reality courts normally have applied in interpreting the antitrust laws.

Specifically, the courts generally have been careful to avoid reading the Sherman Act in a manner that discourages, rather than promotes, competition among individual economic units. Section 1 of the Act prohibits any "person" from engaging in concerted conduct that unreasonably restrains competition. Section 8 of the Sherman Act, 15 U.S.C. 7, defines the term "person" to include corporations and associations, as well as individuals. Thus, it might be possible to read Section 1 to apply to restraints resulting from concerted action by any two or more "persons," so that it could be invoked against joint conduct by a firm and its officers or employees, or by two officers cooperating on behalf of their firm. However, the courts have avoided a formalistic approach that would focus solely on the legal definition of "person" and disregard the fact that in a complex economy the relevant economic unit is likely to be larger than a single individual. The courts uniformly have held that although a corporation and its officers and employees are separate legal persons, concerted action among them amounts to action by a single economic enterprise and therefore does not violate Section 1.[16] The rationale for this approach is

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legality is determined by its efficiency and reasonableness under the circumstances in the middle. By making the legal result turn on the form of internal organization adopted by the enterprise, the intraenterprise conspiracy doctrine can have the effect in some cases of pulling the court from one end of the spectrum of legality to the other for reasons unrelated to competitive effects.

[16] See, *e.g.*, Pet. App. A9; *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, *supra*, 575 F.2d at 286-287; *Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-

that "[a] corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement [of Section 1] would lose all meaning." *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).[17] For similar reasons, the courts have held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions. The divisions are part of a single economic unit, as well as a single legal unit, and "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor * * *." *Id.* at 244.[18]

b. Despite their recognition of economic reality in dealing with conduct of corporate officers and divisions, and their acknowledgment that "as a practical matter, there may be little difference between a wholly-owned subsidiary and a fully integrated division" (Pet. App.

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84 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The courts recognize an exception to this principle in the case of an individual who conspires with the corporation to further his own interests and thus is not acting on behalf of the corporation. See, *e.g.*, *H & B Equipment Co.*, *supra*, 577 F.2d at 244; *Morton Buildings of Nebraska, Inc.*, *supra*, 531 F.2d at 916-917.

[17] See also, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914 (corporation does not violate Section 1 when it exercises its right to select customers and to refuse to sell its goods through its officers and agents, which is the only medium through which it can possibly act); *Dussouy* v. *Gulf Coast Investment Corp.*, *supra*, 660 F.2d at 603 (citing agency principles and application of Section 2 of the Sherman Act to single firm conduct).

[18] See also, *e.g.*, Pet. App. A9; *Spectrofuge* v. *Beckman Instruments*, *supra*, 575 F.2d at 287; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke*, *supra*, 416 F.2d at 83-84.

A9), the courts of appeals have construed this Court's decisions as requiring—at least in some situations—the application of Section 1 to action by separately incorporated components of the same economic unit. See, *e.g.*, Pet. App. A9-A11. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), is generally recognized as the source of this "intraenterprise conspiracy" doctrine. The violation alleged in *Yellow Cab* included the consolidation under single control of formerly independent corporations as a means of effectuating an illegal agreement not to compete. *Id.* at 229.[19] Thus, the combination initially eliminated competition that otherwise would have existed among independent corporations and created a new entity whose market power posed a threat to competition.[20] In this context, the Court rejected the suggestion that a restraint illegal under Section 1 could not result from "a conspiracy among those who are affiliated or integrated under common ownership" (*id.* at 227); it stated that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act" (*ibid*).[21] The language the Court employed was broad. However, its decision can be viewed as holding only that separately incorporated, commonly controlled corporations are subject to Section 1 if the agree-

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[19] The complaint in *Yellow Cab* also alleged that the combination constituted a conspiracy to monopolize in violation of Section 2 of the Sherman Act.

[20] Defendants had "obtained 86% of the Chicago market [for sale of taxicabs], 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market." 332 U.S. at 224. The Court viewed the complaint as alleging that these market shares had been achieved "'by deliberate, calculated purchase for control.'" 332 U.S. at 227-228 (quoting *United States* v. *Reading Co.*, 253 U.S. 26, 27 (1920)).

[21] The Court further stated that "the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S. at 229.

ment at issue has the purpose or effect of bringing formerly independent corporations under common ownership, thereby restraining competition.[22]

The Court applied and expanded its *Yellow Cab* statements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). In *Timken Roller Bearing Co.* the alleged violations included acquisitions of partial ownership interests in horizontal competitors and agreements among those corporations to fix prices and allocate territories. Justice Black there noted that the ownership interests "were obtained as part of a plan to promote the illegal trade restraints" (341 U.S. at 600) and characterized the resulting intercorporate relationship as "the core of the conspiracy" (*id.* at 601). Thus, *Timken* resembles *Yellow Cab* in that the result the Court reached could have been justified on the ground that the acquisitions themselves implemented illegal agreements between formerly independent companies and for that reason constituted an unlawful restraint.

However, in *Kiefer-Stewart Co.* and *Perma Life Mufflers, Inc.*, the Court applied the broad language of *Yellow Cab*, rather than what can be viewed as its more limited holding, to find Section 1 violations by commonly owned corporations in cases in which the alleged violations did not include a combination of formerly independent en-

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[22] Some commentators have suggested this reading of *Yellow Cab*. See, *e.g.*, Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), reprinted in Pet. App. I. The cases cited by the Court in *Yellow Cab* (see 332 U.S. at 227-228) seem to support this reading. In *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377 (1933), which involved formation of a joint selling agency, the Court emphasized that whether or not a combination challenged as violating Section 1 took the form of a corporation was irrelevant: While an otherwise restrictive combination "cannot escape because it has chosen corporate form," a combination that does not restrain competition "is not to be condemned because of the absence of

tities.[23] In neither of these decisions did the Court refer to the significance of the distinction between the legal standards applied to unilateral and concerted conduct under the Sherman Act; nor did it mention any economic considerations indicating that there would have been significant competition between entities under common ownership and control in the absence of the challenged agreements.[24]

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corporate integration." 288 U.S. at 377. In *United States* v. *Reading Co.*, 253 U.S. 26, 57 (1920), the restraint identified by the Court arose from acquisitions by a holding company that gave it control of competing railroads and coal companies. And in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944), the Court upheld a divestiture decree on the ground that "the *creation* of the combination is itself the violation" (emphasis added).

[23] In *Kiefer-Stewart*, the Court found that commonly owned corporations had entered into an illegal conspiracy to fix maximum resale prices. It rejected defendants' argument that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." 340 U.S. at 215. It was the Court's view that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws" (*ibid.*, citing *United States* v. *Yellow Cab Co.*, *supra*). The Court added, without explanation, that "[t]he rule is especially applicable where, as here, respondents hold themselves out as competitors" (*ibid.*).

In *Perma Life*, the Court held that certain sales agreements between a parent corporation and its wholly owned subsidiary violated Section 1. (The Court also read the complaint as charging conspiracies outside the group of affiliated corporations, 392 U.S. at 142, but its holding was not confined to those conspiracies.) No acquisition was involved, and again the Court offered no explanation for the decision to impose Section 1 liability, other than that the defendants had "availed themselves of the privilege of doing business through separate corporations, [and] the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U.S. at 141-142, citing *Timken Roller Bearing Co.*, v. *United States*, *supra*, 341 U.S. at 598, and *United States* v. *Yellow Cab Co.*, *supra*, 332 U.S. at 227.

[24] In at least one case, however, the Court has recognized that ownership and control can be more significant than separate legal identity. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus*

c. The Court's intraenterprise conspiracy decisions have posed a dilemma for the lower courts, at least in part because the decisions are at odds with the general Sherman Act scheme of applying a less stringent legal standard to unilateral, as distinguished from concerted, conduct. The Third [25] and Fifth Circuits [26] have held, without qualification, that concerted action by a parent

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Products Co., 370 U.S. 19 (1962), the Court held that where 12,000 growers had organized into three separate legal entities, those commonly owned entities should be deemed a single organization, so that their dealings with each other were shielded from antitrust liability by the Capper-Volstead Act.

The Court's most recent reference to the intraenterprise conspiracy notion was in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). There the Court, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken*, and *Perma Life*, stated that "even commonly owned firms must compete against each other, if they hold themselves out as distinct entities." 422 U.S. at 116. However, in *Citizens & Southern* the United States did not argue that an agreement between a corporate parent and its legally controlled subsidiaries constituted concerted action cognizable under Section 1. Rather, the government pointed out that the alleged corporate parent owned only five percent of the stock of the smaller banks and was prohibited by state law from owning or controlling more. In that context, the government contended that the smaller banks should have been viewed as legally and economically distinct decision makers fully subject to Section 1 if they agreed with C&S to fix prices or restrain competition in some other manner (Brief for the United States at 24-25, noting that C&S lacked the power legally to require the smaller banks to conform their competitive behavior to its wishes). However, the Court held that C&S's "de facto" branching through "5-percent banks" was procompetitive and that no illegal agreement among the banks had been proved. 422 U.S. at 114, 117-120.

[25] *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33 & n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); *Cromar Co.* v. *Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511-512 (3d Cir. 1976); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1345 (1975).

[26] *H & B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244-245; *Battle* v. *Liberty National Life Ins. Co.*, 493 F.2d 89, 44 (5th Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

corporation and its wholly-owned subsidiary is subject to the standards of Section 1. The Seventh, Eighth and Ninth Circuits, however, have sought to limit the doctrine to situations in which a parent and subsidiary are sufficiently like independent entities that agreements between them should be subject to Section 1.[27] Those circuits require consideration of numerous factors, whose relative weight and importance are left to the factfinder, in determining "how much separation [the companies] in fact maintained in the conduct of their business" (Pet. App. A16).[28] Such a multi-factor analysis naturally

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[27] The courts below followed the Seventh Circuit's earlier decision in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (1979), cert. denied, 445 U.S. 917 (1980). As the court of appeals noted (Pet. App. A11), its analysis is similar to that applied by the Eighth and Ninth Circuits, citing *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581 (8th Cir. 1981), and *Knutson*, v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). See also, *e.g.*, *Hunt-Wesson Foods, Inc.* v. *Ragu Foods, Inc.*, 627 F.2d 919, 927 n.5 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-1055 (9th Cir. 1981), cert. denied, No. 81-2083 (Oct. 4, 1982).

The remaining circuits have not articulated an intraenterprise conspiracy standard. In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1974), cert. denied, 421 U.S. 1004 (1975), the First Circuit considered the intraenterprise conspiracy issue and concluded that in that case "under the *Yellow Cab* doctrine the evidence is sufficient to portray a plurality of actors concerting their efforts toward a common end." 508 F.2d at 557. However, it is not clear from the opinion whether that conclusion is based on factors other than separate incorporation. The Second Circuit has mentioned the issue in several cases, but has not decided it, concluding that, even if there were capacity to conspire, no conspiracy in restraint of trade had been proved. See, *e.g.*, *Syracuse Broadcasting Corp.* v. *Newhouse*, 319 F.2d 683, 687-688 (2d Cir. 1963); *Reisner* v. *General Motors Corp.*, 671 F.2d 91, 100 (2d Cir. 1982), cert. denied, No. 82-35 (Oct. 4, 1982).

[28] For example, the jury here was instructed to determine whether "the two companies, in fact, operated as separate entities" by considering the companies' histories; whether they had separate staffs and offices; whether the parent paid the subsidiary's expenses; the extent of the subsidiary's policymaking independence; the extent of

limits predictability, and both the lower courts and commentators have observed that the intraenterprise conspiracy doctrine has engendered uncertainty. See, *e.g.*, Pet. App. A11-A12. The doctrine has spawned considerable litigation in the lower courts, presumably in part because of the uncertainty surrounding it.

3. We submit that treatment of commonly controlled corporations as a single economic entity for Sherman Act purposes would clarify the law and render it more consistent with the congressional goals underlying the Sherman Act.[29]

a. Antitrust analysis relies on the basic asssumption that an individual or a corporation will organize and use those productive assets subject to its control so as to maximize the profits of the controlling party.[30] Of course, a corporation may decide to operate through separately incorporated subsidiaries and may grant the subsidiaries a considerable degree of operational independence. In some cases, several subsidiaries may appear to "compete" with one another or with the parent. Despite this appearance, corporations under common control cannot properly be viewed as "independent units" or "com-

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the subsidiary's outside sales; whether the companies had separate records and accounts; whether they were "separate participants" in the alleged unlawful acts; whether the companies had separate officers and directors; and "any other facts that you find that are relevant." Pet. App. A40-A41.

[29] In referring to commonly controlled corporations, we view ownership as the determinant of control. In the case of a parent corporation and its wholly-owned subsidiary, it is clear that the parent has ultimate control of the productive assets of the subsidiary. Two wholly-owned subsidiaries of the same parent also would be commonly controlled. Common control could exist in the case of substantial partial ownership as well; in the case of ownership of more than 50% of a subsidiary's stock it may be appropriate (and it would serve judicial economy) to presume that there is common control.

[30] See, *e.g.*, L. Sullivan, *Antitrust* 22-33 (1977); R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 4-11, 728-729, 1060-1069 (2d ed. 1981); 2 P. Areeda & D. Turner, *Antitrust Law* 267-281 (1978).

petitors" in an economic or antitrust context.[31] The relationship between them—even in the absence of "agreement"—will be the result primarily of management decisions rather than market forces.[32] The controlling entity will determine the extent of any "competition" or operational "independence" of the subordinate units on the basis of its conclusions about how best to maximize the profits of the aggregate enterprise—an objective that may be inconsistent with maximizing competition among the commonly controlled units.[33]

It is significant that respondent does not contend that all agreements between commonly controlled corporations should be cognizable under Section 1. Respondent would apply Section 1 only in cases in which the subsidiaries maintain some degree of operational independence and in which the joint conduct disadvantages the trade of third parties (Br. in Opp. 15-16). As we have noted, a general pattern of operational independence, which results from organizational decisions by a controlling entity, does not warrant application of Section 1 to particular instances of what is essentially unilateral conduct. Moreover, the attempt to distinguish between internal and external restraints of trade by commonly controlled corporations is inconsistent with the rationale

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[31] The fact that a parent corporation and its controlled subsidiaries are "held out" as, or appear to the public to be, competitors does not provide an antitrust policy reason to treat them as independent economic decision makers. Basing liability on a "holding out" theory suggests that some misrepresentation causes injury to the public. But none of this Court's Section 1 decisions that mention the public appearance of independence as a reason for treating commonly-controlled firms as independent decision makers suggests that the public was deceived or that deception concerning common control of corporations implicates the policies that led Congress to impose stricter standards on multiparty conduct than on actions of a single economic decision maker.

[32] See Posner & Easterbrook, *supra*, at 729-730.

[33] For an economic analysis of decision making by commonly controlled units of a firm, see, *e.g.*, Hirshleifer, *Economics of the Divisionalized Firm*, 30 J. Bus. 96 (1957).

underlying Section 1.[34] It is the structural relationship of the commonly controlled corporations to each other, not the effect of their conduct on third parties, that determines whether such corporations should be viewed as independent economic decision makers whose agreements involve an aggregation of economic power and thus trigger Section 1 concerns.

A holding that joint action of commonly controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's antitrust enforcement capabilities. Anticompetitive conduct by a parent and its controlled subsidiary would still be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances.[35] If unilateral conduct does

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[34] Such a distinction has been articulated from time to time as a means of limiting the scope of this Court's broad language in *Yellow Cab* and its progeny, while expanding the scope of the Sherman Act prohibition against unilateral conduct. In 1955, a majority of the Attorney General's National Committee to Study the Antitrust Laws expressed the view that Section 1 of the Sherman Act applied to concerted action by a corporate parent and its subsidiary directed against a third party even if the Section 2 criteria for an attempt to monopolize were not met. *Report* at 35. Indeed, a footnote in the 1977 *Antitrust Guide for International Operations* of the Antitrust Division of the Department of Justice (see Pet. 20-21; Br. in Opp. 14, 21) suggested that under existing law, "coercive attempts by members of a corporate group to drive third parties out of business or out of markets" would be illegal under Section 1. But the Division has not developed or pursued that suggestion in its enforcement activities and has looked instead to Section 2 criteria in such situations. As some commentators have noted, the intraenterprise conspiracy doctrine has been invoked primarily in private treble damages actions. See Pet. 14, quoting Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25.

[35] Acquisitions that themselves pose a significant threat to competition are subject not only to Sections 1 and 2 of the Sherman Act, but also to the strictures of Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18. If the acquisition is not itself unlawful, subsequent conduct of the firm created by the acquisition, like that of any other firm, is properly viewed as unilateral, regardless of the firm's internal structure.

not violate the standards of these statutes, Section 1 should not be used to prohibit it (see page 6, *supra*), since there is no indication that Congress intended application of a more stringent standard to unilateral conduct only in the fortuitous circumstance that the economic entity involved has chosen to operate through separate subsidiaries rather than divisions.[36] The difference between these alternative forms of an economic entity's internal organization is entirely unrelated to the purposes of the Sherman Act in differentiating between Section 1 and Section 2 conduct, and federal enforcement policy reflects the understanding that the Act should not be interpreted or applied in a manner that may needlessly impair the ability of an economic entity to adopt whatever form of internal organization will enable it to compete most effectively (see pages 19-20, *infra*).

In applying other provisions of the antitrust laws, courts and enforcement agencies recognize that the formal corporate structure of single economic entities is irrelevant to issues of anticompetitive effect. For example, parent corporations and separately incorporated subsidiaries are considered as one for the purpose of determining market power in Section 2 cases.[37] Subsidiaries also are analyzed in determining whether an acquisition would be illegal under Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18, because of a resulting increase in concentration of market power.[38] Under Fed-

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[36] Even if one thought that Section 2 of the Sherman Act should be construed more liberally, *i.e.*, to reach unilateral conduct that restrains trade, but does not raise a danger of monopoly, there is no reason to impute to Congress an intent to apply a stricter standard to those enterprises that organize themselves into separate subsidiaries.

[37] See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1345, 1348 n.33 (D.D.C. 1981).

[38] For example, the Department of Justice Merger Guidelines (2 Trade Reg. Rep. (CCH) ¶ 4500 (June 14, 1982)) focus on the market shares of "firms" (the economic units), rather than "corporations."

eral Trade Commission regulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. (& Supp. V) 18a, an acquisition made through a separate subsidiary is subject to the premerger reporting requirements of the Act to the same extent as an acquisition made directly by the parent; in addition, the regulations expressly define as a single "person" all entities under common control.[39] These practices are consistent with the principle, articulated by this Court,[40] that the antitrust laws look to economic substance rather than form.

We do not suggest that the various legal "persons" within a single economic entity cannot conspire or otherwise violate the law in other legal contexts. The mere fact that corporate officers and employees work within a single economic entity does not mean they cannot be co-conspirators in some types of cases. For example, it is clear that corporate officials within a single economic entity can conspire with each other, *e.g.*, to defraud the government and thereby violate the law. In addition, where a conspiracy among distinct economic entities exists, a criminal or civil action can be brought under the Sherman Act against responsible officials, as well as the corporations for which they acted.

Rather, our point is that joint conduct by commonly controlled corporations in itself is simply not the sort of "agreement" Congress intended to address under Section 1 of the Sherman Act. Section 1 embodies a concern with aggregations of economic power; it declares illegal those contracts, combinations and conspiracies that are "in restraint of trade." When two or more "persons" within a single economic entity merely act together, there is no

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[39] 16 C.F.R. 801.1(a)(1). Mergers of commonly controlled corporations will not lessen competition, because they do not alter control. For this reason, creation of, or mergers among, wholly-owned subsidiaries of the same parent are expressly exempted from the Commission's premerger notification rules. See 16 C.F.R. 802.30.

[40] See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 46-47 (1977); *Appalachian Coals, Inc.* v. *United States*, *supra*, 288 U.S. at 377.

restraint of trade among them, since they are under common control in any event, regardless of whether they are separate legal entities. In addition, joint action in itself does not change the effect of the conduct on third parties or in the market as a whole, since the participation of a subsidiary, like that of a corporate officer, adds nothing to what would be accomplished by the parent's unilateral direction of the productive assets available to it. Section 1 deals with collaborative practices in which the economic resources under one source of control are joined with those of another. The predicate for Section 1's proscriptions is missing, therefore, where the participants are all part of a single entity. It is simply illogical to impute to Congress an intention to apply the more stringent Section 1 standard to such joint action merely because the controlling entity has chosen one form of internal business organization rather than another.

b. The present state of the law with respect to intraenterprise conspiracy not only fails to conform to the statutory scheme of distinct legal standards for unilateral and multiparty conduct; it actually undermines the goals of the antitrust laws in several respects. First, application of the intraenterprise conspiracy doctrine may interfere with efficient business organization. A firm normally will choose the form of internal organization that maximizes its effectiveness as a competitor, thereby maximizing its efficiency and profits. There is no need to invoke the antitrust laws to correct a firm's mistaken appraisal of its own self-interest, since market forces will accomplish that task. However, the threat of antitrust actions alleging intraenterprise conspiracy may cause a firm to avoid separately incorporated subsidiaries, even if that organizational structure otherwise would be most efficient.[41]

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[41] Respondent contends (Br. in Opp. 22) that there is no empirical evidence that the threat of Section 1 liability has deterred separate incorporation. However, the existence of subsidiaries merely shows that some corporations are willing to take the antitrust risk; others may have been deterred from doing so. *Cf. Joseph E. Seagram &*

Second, the intraenterprise conspiracy doctrine does not provide the business community with clear guidance. The existing confusion and conflict among the circuits concerning the doctrine, and the number and complexity of factual issues that courts have considered in applying the doctrine, create difficulties for firms seeking to make efficient choices regarding corporate structure. Under the current state of the law, it is virtually impossible for firms to determine in advance the extent of potential antitrust liability involved in separate incorporation or to know how operations of separately incorporated subsidiaries should be conducted in order to avoid Section 1 liability.

Decisions such as that of the court below create inefficiencies in the judicial process as well. The possibility of treble damages awards based on intraenterprise conspiracy encourages the filing of federal antitrust suits alleging what appear to be at worst unilateral business torts that do not raise monopoly concerns.[42] Moreover, application of an "all factors" test precludes dismissal at an early stage of litigation, even in cases in which common control is undisputed. Finally, the wide-ranging

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Sons, Inc. v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84 (indicating that Seagram converted its subsidiaries to divisions after *Kiefer-Stewart*). Moreover, the threat of Section 1 liability may constrain structuring of relationships among subsidiaries.

Respondent notes (Br. in Opp. 22-23) that tax considerations, rather than considerations of efficiency, were apparently the motive for separate incorporation in this case. But legal efforts to minimize tax liability can increase efficiency, and thus consumer welfare, in that they allow the firm to attain a given level of profits at a lower product price to consumers. In any event, the responses of business entities to the incentives provided by the tax system presumably are those Congress sought to encourage; if not, they should be addressed through the tax laws without the distortion that results from the intraenterprise conspiracy doctrine.

[42] Here the "restraint" alleged is essentially an interference with contract claim. Respondent dismissed its Section 2 claims before trial (Pet. App. A6).

(and ultimately irrelevant[43]) factual inquiries undertaken in intraenterprise conspiracy cases result in the waste of scarce judicial resources. In view of the considerable volume of private litigation involving the intra-enterprise conspiracy doctrine, the effect on the judicial process is not insignificant.

Accordingly, it is not surprising that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical" (Pet. App. A9; footnotes omitted).[44] Petitioners and amici cite numerous scholarly articles supporting the view that the doctrine impairs economically efficient organization and fails to advance antitrust objectives. Respondent (Br. in Opp. 14-15) cites commentary to the effect that this Court's decisions support an intraenterprise conspiracy challenge to conduct of a parent and subsidiary that unreasonably restrains the trade of third parties. But respondent provides no authority for the proposition that unilateral conduct by a firm that controls, and operates through, separately incorporated subsidiaries is analogous, in terms of Section 1 concerns about aggregations of economic power, to concerted action by otherwise independent firms.[45]

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[43] Most of the factors considered under an "all factors" test look not to whether there are truly independent decision makers, but to how control is exercised or to whether a parent corporation has chosen to delegate considerable operational independence.

[44] See also, *e.g.*, *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 n.8 (9th Cir. 1979) ("the [intraenterprise conspiracy] theory has been subjected to much criticism and comment").

[45] Respondent contends (Br. in Opp. 23-25) that a holding that joint actions by commonly controlled corporations do not constitute an agreement for purposes of Section 1 of the Sherman Act would be inconsistent with other areas of the law in which separately incorporated subsidiaries are treated as distinct from the parent firm. However, subsidiary corporations are not uniformly treated as independent economic units. See, *e.g.*, 26 U.S.C. (& Supp. V) 1501-1504 (consolidated tax returns) and 26 U.S.C. 482 (Secretary's authority to allocate income and deductions among related entities). Even if they were, this would not compel a similar result under the Sherman Act, which embodies different policies from those underlying other areas of the law.

c. Contrary to respondent's contention (Br. in Opp. 8, 19-25), a holding by this Court that commonly controlled corporations do not "conspire" in restraint of trade within the meaning of Section 1 simply by acting together would not amount to a judicially created "antitrust exemption." Rather, like the courts' treatment of intracorporate activity involving officers, employees, and unincorporated divisions, it would simply reflect the recognition that joint conduct within a single economic entity is not the sort of concerted action Congress intended to subject to the strictures of Section 1. The intraenterprise conspiracy notion derives from this Court's prior decisions (see pages 8-11, *supra*); it is entirely appropriate for the Court to reexamine those decisions if it concludes that "the need for clarification of the law in this area justifies reconsideration." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977). The Court's decision in *GTE Sylvania* to reexamine its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was prompted by its recognition that "*Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts * * * have sought to limit its reach." 433 U.S. at 47-48 (footnotes omitted). The Court in *GTE Sylvania* also recognized that reexamination was warranted because the *Schwinn* holding was inconsistent with economic principles underlying the antitrust laws. See 433 U.S. at 51-59.

A judicial reassessment of the intraenterprise conspiracy doctrine is appropriate for similar reasons. This case is a proper vehicle for such reassessment, since the only joint action on which the verdict was based was between a corporation and its wholly-owned subsidiary. The Court should grant certiorari in order to hold that when common control of two corporations is itself lawful under the antitrust laws, the mere fact that those corporations

coordinate their activities will not form the basis for finding concerted action in violation of Section 1 of the Sherman Act. Such a holding would preserve the congressionally mandated distinction between the treatment of joint conduct and unilateral conduct embodied in Sections 1 and 2 of the Sherman Act. It also would resolve the confusion in the courts of appeals concerning application of the intra-enterprise conspiracy concept and would provide increased certainty to the business community. Finally, it would allow economic entities to select the most efficient form of internal organization without risking antitrust liability.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented.

Respectfully submitted.

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONERS

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Dated: August 25, 1983

CHAS. P. YOUNG CHICAGO, INC.

QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of the Sherman Act?

PARTIES TO THE PROCEEDINGS

Petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, were appellants below. Copperweld Corporation is a publicly held company. Approximately 66% of its outstanding common stock is held by Imetal, a French holding company. Various agencies of the French government hold a majority of the stock of Imetal. The remaining stock of Imetal is publicly traded. Copperweld Corporation holds a 46¼% interest in Guardian Oil Company, a 50% interest in Guardian Production Company and a 45% interest in Japan Alumoweld Company, Ltd.*

Regal has no subsidiaries.

Respondent Independence Tube Corporation and its president, David F. Grohne, were appellees below.

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*The remaining interests in those companies are held in the following percentages:

Guardian Oil Company	
Allegheny International Energy Corp....	46.25%
Other (Curtin & Co.; Fitch & Co.; Pavonis Ltd.; Venrock Associates; Vogt Associates; Brown Partners Ltd.; Fidelity Ventures Ltd.; Graylock Partners & Co.; Davenport & Co. of Virginia, Inc.; Red River Venture Inc. and certain individuals).....	7.5%
Guardian Production Company	
Allegheny International Energy Corp....	50%
Japan Alumoweld Company, Ltd.	
Fujikura Ltd.....	45%
C. Itoh & Company, Ltd.....	10%

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In the

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Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 691 F.2d 310 and appears as Appendix A in the Appendix filed with the petition for writ of certiorari (hereafter "Cert. App."). The unreported opinion of the district court denying petitioners' motions for judgment notwithstanding the verdict and a new trial appears as Cert. App. B.

JURISDICTION

The judgment of the court of appeals on the merits was entered on October 1, 1982. (Cert. App. F) A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 1, 1982. (Cert. App. G)[1] A timely

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[1] On January 19, 1982, while the appeal on the merits was pending in the court of appeals, the district court entered judgment on respondent's request for attorneys' fees and costs under 15 U.S.C. § 15. That judgment was superseded by the

(footnote continued on next page)

petition for certiorari was filed on January 28, 1983, and was granted on June 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1976).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, . . ."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

Section 8 of the Sherman Act, 15 U.S.C. § 7, provides in pertinent part:

> "The word 'person,' or 'persons,' wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

(footnote continued from preceding page)

district court's order and opinion of June 21, 1982 (Cert. App. C), as amended by its order and opinion of July 16, 1982. (Cert. App. D) On December 21, 1982, the court of appeals granted petitioners' unopposed motion to enter judgment on the award of fees and costs and to consolidate that judgment with the judgment on the merits. (Cert. App. E)

STATEMENT OF THE CASE

This private action, as presented to the court below, sought recovery under both state tort law and the federal antitrust statutes for a single injury—respondent's loss of profits due to its delay in entering the structural steel tubing business. The gravamen of respondent's state law claims was that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, had interfered with respondent's contract for the purchase of a mill necessary to manufacture structural steel tubing. Respondent's federal claim was that the identical actions by petitioners constituted a conspiracy to restrain trade in the structural steel tubing market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Respondent's state law claims resulted in a final judgment approximating $2.5 million and are not at issue here. The sole issue before this Court is whether the asserted "conspiracy" between petitioners could properly transform those state claims into a Sherman Act violation resulting in an award for treble damages and attorneys' fees in excess of $9 million. Petitioners submit this Court should re-examine the intra-enterprise conspiracy doctrine and hold that a parent corporation and its wholly-owned subsidiary do not by themselves provide the plurality of actors necessary to satisfy the "contract, combination . . . or conspiracy" requirement of Section 1 of the Act.

1. Factual Background

The essential facts as summarized by the court of appeals are not in dispute.[2]

The predecessor of petitioner Regal Tube Company began its existence in 1955 as a Chicago firm that manufactured steel tubing for use in heavy equipment, cargo vehicles, and

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[2]The statement of the case in respondent's brief in opposition to the petition largely ignored the court's factual summary. In its place, respondent relied on evidence (which it has also designated for the Joint Appendix) that was sharply contested before the jury.

construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C. E. Robinson Company. In 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc., a California-based manufacturing concern. David Grohne, one of the counter-defendants below, came to Regal in 1959, became its Vice President and General Manager in 1968, and stayed on as President of the division after Regal was sold to Lear Siegler. (691 F.2d at 313-14; Cert. App. A-3)

In 1972 petitioner Copperweld purchased the Regal division from Lear Siegler.[3] The sale agreement bound Lear Siegler not to compete with Regal, or to allow any subsidiary it controlled to do so, anywhere in the United States for five years. After the sale Copperweld transferred all Regal's assets to a newly formed Pennsylvania corporation also named Regal Tube Company. Thus Regal was once again a corporation, rather than a division, but it was wholly owned by Copperweld. It continued to conduct all its manufacturing operations in Chicago although it shared corporate headquarters in Pittsburgh with Copperweld. (*Id.* at 314; Cert. App. A-3)[4]

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[3] At the time of the merger and thereafter, Copperweld was not engaged in the manufacture of structural steel tubing. Copperweld and Regal thus never competed with each other and never held themselves out as competitors. (Breedlove Tr. 4891-92; Foster Tr. 4268)

[4] Copperweld decided to incorporate Regal as a wholly-owned subsidiary, rather than continue it as a division, to avoid discriminatory double taxation by Pennsylvania (where Copperweld is headquartered) and Illinois (where Regal has most of its assets). Notwithstanding Regal's separate incorporation, all of its officers and directors were Copperweld officers or directors, Regal's financial reports and SEC filings were fully consolidated with those of Copperweld, Copperweld exercised strict control over Regal's bank accounts and Regal was not authorized to make any capital expenditure in excess of $10,000 without Copperweld approval. (Breedlove Tr. 4875-84, 4900-02, 4909-10, 4922-23, 4927-28; Kaplan Tr. 5702; Smith Tr. 3051)

As the sale of Regal to Copperweld was being negotiated, David Grohne was considering his options, including an offer to continue with Regal. By the time the sale was consummated, Grohne had accepted a job as Lear Siegler's Corporate Secretary, a position he held from February to July 1972. While continuing to work for Lear Siegler, Grohne actively pursued establishing his own steel tubing business. In May 1972 he formed respondent Independence Tube Corporation and sought bids on tubing mills from manufacturers. By late October his new company had a firm offer from The Yoder Company, and in December 1972 it gave Yoder a purchase order which called for the delivery of a mill by the end of December 1973. (*Id.*)

Petitioners first learned of respondent's plans in the winter of 1972-1973. Their initial thought was that the non-competition agreement Lear Siegler had signed ought to prevent respondent's competitive venture. Copperweld's outside counsel advised on the basis of the then-available facts that the agreement did not, although he thought it might be possible to obtain an injunction against respondent's activities if and when it made use of any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," which Copperweld had purchased. (*Id.* at 314; Cert. App. A-4) Copperweld was further advised to send letters to respondent's potential suppliers, notifying them that Copperweld would take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." (*Id.*) The rationale for these letters was to prevent third parties from developing reliance interests in dealings with respondent that might later make a court reluctant to enter an injunction at Copperweld's behest. (*Id.*)

One of the Copperweld letters was sent to Yoder on February 19, 1973. Yoder, which had accepted respondent's purchase order for a tubing mill, voided the acceptance two days later when it received Copperweld's letter. Thereafter respondent opened negotiations with an alternative supplier,

Abbey Etna Machine Company, which agreed to ship the necessary tubing mill by September 1974. Although Abbey also received one of Copperweld's warning letters, it performed its agreement with respondent. Respondent commenced operations on September 13, 1974, nine months later than it might have if Yoder had delivered the tubing mill as originally agreed. *(Id.)*[5]

2. Proceedings in the District Court

Respondent commenced this action in the United States District Court for the Northern District of Illinois in 1976. Its complaint, as amended in 1977, alleged that: (a) petitioners Copperweld and Regal, along with Phillip Smith, the Chairman and Chief Executive Officer of both companies, had conspired with Yoder to restrain trade in the market for structural steel tubing in violation of Section 1 of the Sherman Act; (b) petitioners and Smith had attempted to monopolize that market in violation of Section 2 of the Sherman Act; and (c) petitioners and Smith had interfered

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[5] In addition to Copperweld's letters to Yoder and Abbey, the district court found in its memorandum opinion denying petitioners' j.n.o.v. and new trial motions that petitioners' activities after February 19, 1973 included: "telephone calls between [Copperweld] and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts, between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's product." (Cert. App. B-7) Whereas respondent argued these activities were all part of a scheme to keep it out of the steel tubing business, petitioners contended they were part of their efforts to gather information and protect against respondent's invasion of Regal's proprietary rights. In practical terms this dispute is immaterial, since it was undisputed that the February 19, 1973 letter to Yoder was the only "conspiratorial" act found by the jury to have injured respondent. (Cert. App. B-4)

with respondent's contractual relations with Yoder.[6] Petitioners counter-claimed, charging Independence and Grohne with unfair competition by taking Regal's proprietary information and key employees. (691 F.2d at 314-15; Cert. App. A-5)

Before trial respondent dismissed its Section 2 attempt to monopolize claim. It also dismissed Smith from all counts in which he was named. The liability portion of the case was tried to a jury between November 1980 and February 1981. At the conclusion of the evidence the district court directed a verdict against petitioners on the issues raised by their counterclaims and sent the remainder of the case to the jury. In answer to special interrogatories, the jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act, but that Yoder had not been involved in the conspiracy. It also found that Copperweld (but not Regal) had interfered with respondent's contractual relationship with Yoder.[7]

At the subsequent damage trial, the district court instructed the jury that respondent's damages from the antitrust violation and the interference with its contract were identical, and the jury set both figures at $2,499,009. After trebling (and the award of $15,000 for the libel and slander claim), judgment was entered against petitioners on May 27, 1981 for $7,512,027, plus reasonable attorneys' fees and costs. (691 F.2d at 315; Cert. App. A-7) On June 22, 1981, the district court denied petitioners' j.n.o.v. and new trial motions (Cert. App. B), and thereafter fixed the recoverable attorneys' fees and costs at $1,814,673. (Cert. App. C)

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[6] Respondent also alleged breach of contract by Yoder and libel and slander by petitioners, but those pendent claims are not before this Court.

[7] The jury thus found that the identical conduct by petitioners was unilateral for purposes of the tort claim and conspiratorial for purposes of the Sherman Act claim.

3. The Seventh Circuit's Decision

On appeal, the Seventh Circuit affirmed the judgment in all respects, including the jury's finding that Copperweld had "conspired" with its own wholly-owned subsidiary. Nevertheless, the court (per Chief Judge Cummings) recognized that there were practical and theoretical difficulties with the intra-enterprise conspiracy doctrine upon which this result depended. As Judge Cummings stated:

> "We may begin with antithetical truisms. Two independent corporations can engage in concerted activity that violates Section 1 of the Sherman Act. A corporation and its officers, or a corporation and one of its fully integrated divisions cannot, because the requisite plurality of actors is missing. The hard case lies between these opposites: can a corporation conspire with its wholly-owned subsidiary?" (691 F.2d at 316; Cert. App. A-9)

Judge Cummings observed that in "a purely formal sense" a conspiracy was possible, since "there are two corporations and hence two actors." (*Id.*) But "as a practical matter there may be little difference between a wholly-owned subsidiary and a fully integrated division . . . ." (*Id.*) Because of the lack of any reasoned basis for treating subsidiaries differently, the court acknowledged that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; Cert. App. A-9; footnote omitted; citing Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), including the bibliography at 23 n.3, and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982)). As the court explained:

> "The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value. They also point out that government enforcement agencies do not use the doctrine. Rather it surfaces in private suits

—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies. Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed, and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal." (691 F.2d at 317; Cert. App. A-9-10; footnotes omitted)

Despite these compelling objections to the intra-enterprise conspiracy doctrine, Judge Cummings noted that judicial reaction to the doctrine has been "constrained" by this Court's opinions which, "while they need not be read with complete literalism, of course they cannot be ignored." (*Id.* at 317-18; Cert. App. A-10; footnote omitted) The result has been substantial divergence among the circuits, as the lower courts have adopted "various limiting approaches—but no move to abolish the doctrine root and branch." (*Id.* at 317-18; Cert. App. A-11)

The Seventh Circuit stated that its own approach had been established in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). Judge Cummings characterized the "test" in that case as focusing on "a variety of factors" designed to ascertain "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible" for conspiracy purposes. (*Id.* at 318; Cert. App. A-11) In *Photovest*, the court relied on Professor Sullivan's *Handbook of the Law of Antitrust* (1977) in concluding that:

"Some relevant factors to consider include [1] the extent of the integration of ownership, [2] whether the two corporations have separate managerial staffs, . . . [3] the extent to which significant efficiencies would be sacrificed if they were required to act as two firms, [4]

> their history, whether they functioned as separate firms before being partially integrated, and [5] finally, the extent to which they may, acting as one, wield market power which they would not possess if viewed as separate firms.'" (606 F.2d at 726, quoting Sullivan § 114, at 328)

Nevertheless, Judge Cummings found no error in the trial court's nine-part instruction here, which made no mention of the first, third or fifth of the Sullivan factors and which substituted others not referred to in *Photovest*.[8] Nor did he find error in the open-ended conclusion to the instructions where the jury was told it could also consider "any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-41)

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[8]The trial court instructed the jury to consider: "1. The history of the two companies, that is, whether they functioned as separate companies before they became affiliated; 2. Whether the two companies are run by separate management staffs; 3. Whether the two companies maintained separate corporate offices; 4. Whether the parent corporation pays the salaries, expenses, or losses of the subsidiary; 5. The degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of labor agreements, and other aspects of his business. In this connection you should consider both the day-to-day operating decisions and the major or executive policy decisions; 6. Whether the subsidiary generates substantial business accounts independent of the parent, or whether the bulk of the sales of the subsidiary were made to other Copperweld corporations or subsidiaries; 7. Whether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans; 8. Whether both companies were separate participants in the alleged unlawful activity complained of by Independence; [and] 9. Whether both companies have common officers or directors. The existence of some common officers or directors does not alone render the two companies incapable of conspiracy." (*Id.* at 331-32; Cert. App. A-40-41)

The court of appeals acknowledged that its approval of these instructions left the applicable legal standards in an "unsettled stage of development," but asserted this was "inevitable" with "(a) any test that involves the presence or absence of various unranked factors, (b) the possibility that the list will expand or contract, and (c) as yet limited application." (*Id.* at 318; Cert. App. A-11-12) According to the court, "the uncertainties that necessarily exist now will be obviated as the test is applied and refined." (*Id.*; Cert. App. A-12)

SUMMARY OF ARGUMENT

Thirty-five years ago, in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), this Court first announced the broad outlines of the intra-enterprise conspiracy doctrine, which permits affiliated corporations to be found guilty of a conspiracy in violation of Section 1 of the Sherman Act. In the ensuing years, neither this Court nor the lower courts have been successful in developing a principled or consistent basis for applying that doctrine. The result below is illustrative. The court of appeals sustained a finding of Sherman Act "conspiracy" for actions that would have constituted only unilateral interference with contract had they been carried out scarcely a year earlier, when petitioner Regal operated as an unincorporated division rather than a subsidiary corporation. This random result dramatizes the irrationalities in the present doctrine and underscores the need for this Court to fashion a new rule, consistent with sound antitrust theory and business reality, that wholly-owned corporate affiliates do not provide the requisite plurality of actors for a violation of Section 1.

I.

Contrary to the announced aim in *Yellow Cab* that Section 1 liability should depend on "substance rather than form" (332 U.S. at 227), the intra-enterprise conspiracy doctrine has had precisely the opposite effect. By making Section 1 liabil-

ity turn on whether the alleged "conspirator" is an unincorporated division or a corporate subsidiary, the doctrine has mistakenly emphasized the formalities of corporate organization while ignoring the absence of competitive consequences. This artificial distinction deters the efficiencies that can flow from separate incorporation and that can benefit the firm, its employees, and the consuming public. Such a result is inconsistent with the fundamental goals of the Sherman Act and blurs the purposeful distinction made by Congress between the antitrust consequences of joint conduct within a single economic enterprise and joint conduct with outsiders.

II.

Neither in *Yellow Cab* nor in any subsequent case has this Court addressed the serious theoretical and practical deficiencies in the intra-enterprise conspiracy doctrine. Indeed, invocation of the doctrine was unnecessary to the result reached in most, if not all, of this Court's decisions. Moreover, while this Court's early dicta suggested a rule of sweeping application, more recent decisions have given a far narrower cast to the doctrine.[9] These later decisions have refused to find a conspiracy between parent and subsidiary after examining the economic reasons supporting the corporate relationships under attack. In light of these decisions, a comprehensive re-examination of the doctrine is in order to remove the escalating confusion among the circuits and to substitute a rule in line with proper antitrust goals.

III.

The lower courts have endeavored unsuccessfully to resolve the tension between this Court's early pronouncements on the breadth of the intra-enterprise conspiracy doctrine and its crucial operational and doctrinal failings by essaying various

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[9] *See Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), and *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), discussed at pp. 30-32 *infra*.

limiting rules. Applied in ad hoc fashion, sometimes inconsistently within the same circuit, these limiting rules have provided no legal standard that is either theoretically defensible or practicably workable. Representative is the test advanced by the court below, which gives the jury free rein to consider nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-41; emphasis added) Although put forward as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem" (*id.* at 318; Cert. App. A-12), its very formulation accentuates the indeterminacy that has frustrated intelligent planning by corporate managers and their counsel.

IV.

This Court should end the uncertain and unwise consequences of the current intra-enterprise conspiracy doctrine by ruling that a parent and its wholly-owned subsidiary do not provide the requisite plurality of actors for a conspiracy under Section 1 of the Sherman Act. Such a rule would recognize that, since there is a complete unity of legal and economic interests, a parent and its wholly-owned subsidiary corporation should be viewed as a single enterprise. The rule would thus be consistent with the distinction drawn by Congress in Sections 1 and 2 between the treatment of a single economic enterprise and the treatment of truly separate firms. Most important, the rule would remove the arbitrary differentiation between unincorporated divisions and wholly-owned subsidiaries and permit corporate managers to select the appropriate form of organization on the basis of the real efficiencies for the firm and the public. In short, the rule would place the doctrine on a principled foundation, resolve the existing disarray among the lower courts, and establish an easily administered test consistent with sound antitrust and economic goals.[10]

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[10] Although this case is limited to the situation of a parent corporation and its wholly-owned subsidiary, petitioners agree

(footnote continued on next page)

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Conflicts With Proper Antitrust Policy, Efficient Economic Organization And Sound Judicial Administration.

As the Seventh Circuit remarked, "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; Cert. App. A-9; footnotes omitted) Respected commentators—as well as courts, practitioners and the business community—have identified four fundamental failings in the doctrine:

> *First*, the doctrine's distinction between unincorporated divisions and corporate subsidiaries "exalts form over substance without providing any countervailing antitrust benefits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 72)
>
> *Second*, by deterring the use of corporate subsidiaries, the doctrine "promote[s] behavior inconsistent with antitrust goals by encouraging firms to select less efficient and more centralized forms of organization." (Note, *supra*, 95 Harv. L. Rev. at 681)
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> *Third*, the doctrine runs counter to the statutory scheme of the Sherman Act by inviting "the inappropriate or even irrelevant application of substantive rules designed to deal with cartel or other truly conspiratorial behavior." (P. Areeda, *Antitrust Analysis* ¶ 334, at 401 (3d ed. 1981))
>
> *Fourth*, the doctrine's theoretical and practical inconsistencies have led to "thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts—leaving no one

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(footnote continued from preceding page)

with the position taken by the United States in its amicus brief supporting the petition that two wholly-owned subsidiaries of the same parent should also be viewed as a single actor. (Br. of U.S. at 14 n.29)

able to point with confidence to the location of the boundary between legal and illegal business conduct. . . ." (Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 21 (1968))

A. The doctrine artificially differentiates between unincorporated divisions and wholly-owned subsidiaries.

It has long and consistently been held that a parent corporation cannot be found liable under Section 1 of the Sherman Act for "conspiring" with an unincorporated division. *E.g.*, *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970). As the Fifth Circuit observed in the *H&B Equipment* case, "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor, especially when the separate parts are united under corporate law." (577 F.2d at 244) The Ninth Circuit echoed this judgment in *Hawaiian Oke*, where it stressed that:

> "Once the theory that 'divisions' or other internal administrative units of a single corporation can 'conspire' with each other is accepted, we can see no sensible basis upon which it can be decided that, in one case, there has been a conspiracy and that, in another, there has not. No corporation of any size can operate without an internal division of labor between various of its officers and agents. The larger the enterprise, the more necessary such internal units become. Moreover, sound management demands extensive delegation of authority within the organization." (416 F.2d at 83)

Precisely the same economic and business realities should govern in the case of an alleged "conspiracy" between a parent and its wholly-owned subsidiary. There is no principled basis for concluding that one form of corporate organization will have any more or less likelihood of creating anticompetitive concerns in the marketplace. In most cases,

businessmen do not know or care whether their rival is organized as a division or corporate subsidiary. Allowing crucial Sherman Act distinctions to turn on such a formalistic basis is especially illogical in the case of wholly-owned subsidiaries, where the parent has the unquestioned legal power to switch from one form of corporate organization to another.

Yet the intra-enterprise conspiracy doctrine fosters just such a formalistic and illogical result, as the outcome below demonstrates. Petitioner Regal Tube Company began its existence as a corporate subsidiary of C. E. Robinson Company. Thereafter, it was operated for several years as an unincorporated division of Lear Siegler. Finally, following Regal's acquisition by Copperweld, it was again set up as a wholly-owned subsidiary to avoid discriminatory double taxation. Despite these changes in the *form* of Regal's organizational status, there is no evidence that the *substance* of its operations changed in any respect. Moreover, the evidence showed that Regal was run identically to other of Copperweld's businesses that were run as unincorporated divisions. (Foster Tr. 4177; Breedlove Tr. 4895-96, 4908, 4925).

Thus, the finding of Sherman Act "conspiracy," and the significant treble damage liability it entailed, turned on the fortuity of Regal's corporate organization, not on any difference in how it affected the market. It is no answer that Section 1 prohibits only "persons" from engaging in concerted restraints of trade and that unincorporated divisions, in contrast to corporate subsidiaries, do not meet the technical definition of a "person" in Section 8 of the Act. Corporate officers and employees are clearly "persons" within the meaning of the Act; yet the courts have uniformly held that they, too, do not make up the plurality of actors required for a "conspiracy" under Section 1. *E.g.*, *H&B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84; *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368

U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S. Ct. 362 (1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).[11]

In the case of officers and employees, the courts have eschewed formalistic reliance on the definition of "person," and looked instead to the actualities of the business world. Just as with unincorporated divisions, the courts have concluded that a corporation and its officers or employees should be treated as a single economic unit for Sherman Act purposes, since:

> "A corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement would lose all meaning." (*H&B Equipment Co.* v. *International Harvester Co.*, *supra*, 577 F.2d at 244)

Manifestly, the plurality requirement has "lost all meaning" under the intra-enterprise conspiracy doctrine when joint action by a parent and its corporate subsidiary is treated

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[11] Of course, where a corporation and its officers or employees are involved in conspiratorial activity with unaffiliated corporations, a criminal or civil action can be brought under the Act against the responsible officers or employees, as well as the corporations for which they acted. But that was not the case here.

It should also be noted that Section 1 itself does not define a conspiracy in terms of an agreement between two legal "persons." Rather, it specifies that if a conspiracy has been found to exist, every "person" that enters into the conspiracy may be found liable. Consequently, while Section 8's definition of a "person" to include a corporation ultimately determines who may be found liable for a Sherman Act conspiracy, it does not determine what actors are necessary to give rise to a conspiracy in the first place. This determination has been made by the courts.

differently from the same action by the parent and its unincorporated division, officer or employee.

B. The doctrine inhibits efficiency.

The arbitrary distinction made by the intra-enterprise conspiracy doctrine between subsidiaries and divisions leads to substantial inefficiencies for the firm and the consumer. The reason is that, by penalizing separately incorporated subsidiaries for the identical conduct permitted to unincorporated divisions, "the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units." (McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 183 (1955))[12]

The Seventh Circuit itself acknowledged that abandonment of subsidiary operations can eliminate important efficiencies. (691 F.2d at 317 n.7; Cert. App. A-10) In addition to preventing discriminatory double taxation, as in this case,[13] use of subsidiaries can allow enterprises to accommo-

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[12] Although respondent contended in its opposition to the petition that there was no evidence that the current doctrine has deterred separate incorporation (Br. in Opp. at 22), a particularly striking example was the decision by Seagram following *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), to convert all its subsidiaries to divisions. (*See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84) The same response was apparently made by American Timken after *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). *See* Memorandum of United States in Response to the Motion of the Timken Company to Terminate the Final Judgment at 7 (May 20, 1983), *United States* v. *Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

[13] Both the court of appeals (691 F.2d at 317 n.7; Cert. App. A-10) and respondent (Br. in Opp. at 22-23) erroneously suggested that a reduction in taxes may not involve "real"

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date differing personnel and incentive policies within a single corporate family, can improve management accountability and efficiency, can preserve the goodwill associated with newly acquired assets, can allow corporations to accommodate special investment conditions in foreign operations, and can permit firms to comply with regulatory policies.[14]

Under current doctrine an attempt to achieve any of these perfectly legitimate benefits—or to comply with foreign or domestic regulatory requirements—is tied to heightened antitrust risk. Imposing this risk would be rational only if separate incorporation were in some way related to a threat to competition. It is not. "The business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by

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efficiencies. As the government pointed out at the petition stage, however, reducing or avoiding taxes through legal means can increase efficiency by permitting the firm to achieve lower costs and hence lower prices to its customers. (Br. of U.S. at 20 n.41)

[14] For example, the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8), requires separate incorporation of designated non-banking businesses in order to insulate depositors from outside business risks. The Federal Communications Commission has required AT&T to separate its regulated and non-regulated operations, thereby minimizing the risk of cross-subsidization. *Second Computer Inquiry*, 77 F.C.C.2d 384, 457-90 (1980), *Reconsideration Decision*, 84 F.C.C.2d 50 (1980), *Further Reconsideration Decision*, 88 F.C.C.2d 512 (1981). The FDIC recently proposed to allow state non-member banks to engage in a variety of securities activities through a separate subsidiary (to be regulated by the SEC) that would reduce the risk of conflicts of interest. *Isaac Defends FDIC's Securities Proposal Before House Panel*, [July-Dec.] Wash. Fin. Rep. (BNA) Vol. 41, No. 1 at 6 (July 4, 1983).

the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (Areeda, *supra*, at 399-400)[13]

The result of the current doctrine is thus to promote behavior inconsistent with antitrust goals by deterring firms from using corporate subsidiaries that could secure efficiencies not obtainable through unincorporated divisions. The court below sought to escape this unsound result with its rule that, "where the differences [between subsidiary and divisional organization] are trivial Section 1 liability should not turn on them." (691 F.2d at 316; Cert. App. A-9) However, by focusing on "how much separation Regal and Copperweld in fact maintained in the conduct of their business" (*id.* at 320; Cert. App. A-16), the court's rule leads to exactly the opposite effect from what was intended. Under the court's "separation" test, if the parent gives substantial autonomy to its subsidiary and exercises only general managerial supervision, it runs the risk of a "conspiracy" finding. On the other hand, if the parent exercises tight control over its subsidiary and leaves it with little freedom of action, the parent can arguably reduce the risk of Section 1 liability.

Handler and Smart correctly point out that such an "anomalous result" turns the intra-enterprise conspiracy doctrine on its head: "Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to

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[13] As Assistant Attorney General McLaren stated in 1971: "A corporation may establish subsidiaries for various financial, legal or commercial reasons. Since such multiple corporations have an identical goal—to earn profits for their common owner—they should not be expected to act with respect to each other as if they were independent competitors." Letter from Richard McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 5 Trade Reg. Rep. ¶ 50,122 (Feb. 22, 1971); *See* 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* at 34.

the fullest extent." (3 Cardozo L. Rev. at 75) What is more, the result flies in the face of modern theories of management, which emphasize the benefits to the firm, its employees and its customers from delegating significant authority to local management. (*See, e.g.*, P. Drucker, *Management* 575, 579-80 (1974); T. Peters & R. Waterman, *In Search of Excellence: Lessons from America's Best-Run Companies*, Ch. 7 (1982)).

C. The doctrine is inconsistent with the statutory scheme.

The intra-enterprise conspiracy doctrine not only contradicts the basic efficiency goals of the Sherman Act, it also runs counter to the statutory framework of the Act. Congress established two distinct standards for evaluating whether conduct raises antitrust concern. Section 1 of the Act, which is limited to concerted action by two or more firms, reaches any activity that unreasonably restrains trade, without regard to whether that activity threatens monopoly. Section 2, by contrast, reaches unilateral action by a single firm and requires at least a dangerous probability of monopolization. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

The dichotomy between the reach of Sections 1 and 2 reflects Congress's policy decision to encourage vigorous competition among separate economic entities by imposing a stricter standard of liability on concerted conduct. Thus Section 1 liability can be imposed *without any proof of market effect* when the conduct falls within certain *per se* categories. *See Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). In fact, a Section 1 violation can be established even when the "conspirators" lack the market power to accomplish their objective. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).[16] By contrast, under Section 2, liability of a single firm depends on proof of adverse market effects.

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[16] In *Socony*, this Court stated: "The existence or exertion of power to accomplish the desired objective . . . becomes important only in cases where the offense charged is . . . actual monopolizing . . . in violation of § 2. . . . [T]he crime under § 1 is legally

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As the government stated in its brief supporting the petition: "there is no violation [of Section 2] unless analysis of market structure and conduct indicates the presence of at least a dangerous probability of monopolization." (Br. of U.S. at 4; footnote omitted)

The conceptual flaw in the intra-enterprise conspiracy doctrine is that it applies the more stringent standard of Section 1 to conduct within a single economic unit on the basis of a parent's choice of corporate form. As Handler and Smart point out, "it is contrary to the underlying policy assumptions of section 1 to treat two firms of comparable size differently solely on the basis that one firm has organized itself through use of subsidiaries and the other through divisions." (3 Cardozo L. Rev. at 73)[17]

In short, making the application of Section 1 turn on the formality of corporate organization not only blurs the purposeful distinction made by Congress between unilateral and multiparty behavior, but undermines the policy concerns that underlie that distinction. Section 1 is concerned with concerted activity that restrains trade. There is no restraint of trade in any meaningful economic or business sense, however, when two or more "persons" under the same legal control "agree" on a course of competitive action. A parent acting jointly with its wholly-owned subsidiary has no more impact on the market than a parent acting through an employee in charge of one of its divisions.

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distinct from that under § 2. . . ." (310 U.S. at 226 n.59; citations omitted).

[17] Accordingly, a ruling by this Court that a parent cannot conspire with its wholly-owned subsidiary would not create a judicially imposed "antitrust exemption," as respondent has argued. (Br. in Opp. at 19-25) Such a rule would be fully consistent with the statutory scheme envisioned by Congress, just as is the long-settled rule that corporations cannot conspire with their officers or employees.

By failing to recognize the fundamental distinction between Sections 1 and 2, the intra-enterprise conspiracy doctrine has also served "to confuse the law and encourage meritless lawsuits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 62) As the authors explain:

> "A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization. Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition." (*Id.* at 24-25; footnotes omitted)

The present case is illustrative, since the jury award for tortious interference with respondent's contract has already fully compensated it for any actual injury to its business.

D. The doctrine lacks predictability for the bench, bar and business community.

The end result of the intra-enterprise conspiracy doctrine as it has evolved over the last three-and-a-half decades is that "[t]he cases, commentary and settled practices are in disarray." (L. Sullivan, *The Handbook of Antitrust Laws* § 114, at 323 (1977)) The Ninth Circuit has dramatically described the confusion among the circuits: "The antitrust cases determining the existence or absence of any intraenterprise conspiracy, when taken collectively, resemble a thaumatrope.[18] Rules seemingly clear on their face become an unresolved conceptual blur when applied to the variant fact

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[18] "[A] scientific toy illustrating the persistence of visual impressions, consisting of a card or disc with two different figures drawn upon the two sides, which are apparently combined into one when the disc is rotated rapidly . . . ." II *The Compact Edition of the Oxford English Dictionary* at 3278 (Oxford Press 1971).

situations presented by diverse economic entities and functional structures." *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625 (9th Cir. 1977).

The confusion and conflict among the circuits has created understandable uncertainty on the part of businessmen seeking the most efficient, and yet legal, corporate organization. As the National Association of Manufacturers stressed in its amicus brief in support of the petition, the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations." (Br. at 3) The Chamber of Commerce similarly emphasized that the "confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability." (Br. at 2)

The absence of a clear and principled rule of decision also thwarts efficient judicial administration. By the time the petition was filed, the intra-enterprise conspiracy doctrine had spawned nearly 190 reported decisions, and the number was increasing rapidly. Whereas there were only 17 decisions in the ten years following *Yellow Cab*, Appendix H to the petition listed over 125 during the last decade. In the seven months since Appendix H was compiled, another 21 decisions have been generated in the judiciary's continuing struggle to deal with the doctrine.[19] The rule advanced by

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[19] Nine of these cases explicitly discuss the doctrine. *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787 (5th Cir. 1983); *University Life Ins. Co.* v. *Unimarc, Ltd.*, 699 F.2d 846 (7th Cir. 1983); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d. 965 (9th Cir. 1983); *Bunch* v. *Artec International Corp.*, 559 F. Supp. 961 (S.D.N.Y. 1983); *General Electric Co.* v. *Bucyrus-Erie Co.*, 563 F. Supp. 970 (S.D.N.Y. 1983); *Levicoff* v. *General Motors Corp.*, 551 F. Supp. 98 (W.D. Pa. 1982); *In re Mid-Atlantic Toyota Antitrust Litigation*, 560 F. Supp. 760 (D. Md. 1983); *Loube* v. *Chrysler Corp.*, 1982-83 Trade Cas. ¶ 65,098 (D. Md. 1982);

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the court below, which relies on a long and ever-changing list of "variables," can only exacerbate these difficulties, since it is likely to encourage litigation, preclude summary judgment and prolong trials. Plainly, a different approach is required.

II. This Court's Intra-Enterprise Conspiracy Opinions Have Not Resolved The Doctrine's Grave Policy And Practical Deficiencies.

The intra-enterprise conspiracy doctrine has figured in at least eight of this Court's Sherman Act decisions. In none, however, has the Court squarely addressed the doctrine's serious theoretical and pragmatic shortcomings. It is arguable, in fact, that invocation of the doctrine was unnecessary to the result in all, or nearly all, of the cases. Particularly in several recent cases, the Court has declined to give full effect to its earlier dicta on the ground that to do so would "impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect. . . ." *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).

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Damon Corp. v. *Geheb*, 1982-83 Trade Cas. ¶ 65,117 (N.D. Ill. 1982).

See also Litton Systems, Inc. v. *AT&T*, 700 F.2d 785 (2d Cir. 1983); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982); *Ingram Corp.* v. *J. Ray McDermott & Co.*, [illegible] F.2d 1295 (5th Cir. 1983); *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467 (9th Cir. 1983); *D&S Redi-Mix* v. *Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982); *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th. Cir. 1983); *Giguere's Supermarkets, Inc.* v. *Hannaford Bros. Co.*, 1983-1 Trade Cas. ¶ 65,243 (D. Mass. 1983); *Turner* v. *Johnson & Johnson*, 549 F. Supp. 807 (D. Mass. 1982); *King* v. *Johnson Wax Associates, Inc.*, 1983-1 Trade Cas. ¶ 65,416 (D. Md. 1983); *A.L. Adams Construction Co.* v. *Georgia Power Co.*, 557 F. Supp. 168 (S.D. Ga. 1983); *U.S. Audio & Copy Corp.* v. *Philips Business Systems Inc.*, 1983-1 Trade Cas. ¶ 65,364 (N.D. Cal. 1983); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 554 F. Supp. 182 (D.D.C. 1982).

A. The sweeping generalizations of the early decisions.

This Court first considered the question whether there can be a conspiracy between corporations under common control in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).[20] In that case, defendants were a group of affiliated individuals and corporations charged with "a combination and conspiracy to restrain [trade] and to monopolize interstate trade and commerce" in the sale of taxicabs and taxicab services in four metropolitan markets, in large part through acquisitions of local operators. (*Id.* at 220) Responding to the defense that the "restraints occur[red] in a setting described by the appellees as a vertically integrated enterprise," the Court stated:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act." (*Id.* at 227)

The *Yellow Cab* case has provoked sharp controversy over its significance. Because some of the affiliates in *Yellow Cab* were as little as 18% commonly owned, some commentators have explained the Court's ruling on the ground that the defendants could not properly be viewed as a single enterprise, either legally or economically. (Note, *Intra-Enterprise*

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[20] While respondent has noted (Br. in Opp. at 10) that the Court had earlier held affiliated corporations liable for a Sherman Act conspiracy in *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), that case did not consider the contention that such corporations constituted a single entity for Section 1 purposes. In fact, *American Tobacco* also involved an attempt to monopolize under Section 2. *See also United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 179 (1944).

Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977)). Other commentators have suggested the case should be understood as involving Section 2, rather than Section 1 principles, particularly in light of this Court's later observation in *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), that the *Yellow Cab* affiliates acted "with the intent and purpose of monopolizing the cab business in certain cities." (334 U.S. at 522; Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 40).

Probably the fairest reading of the *Yellow Cab* holding is that corporate acquisitions designed to achieve an unreasonable restraint of trade or monopoly are not insulated from Sherman Act challenge merely because common ownership is ultimately achieved. (McQuade, *supra*, 41 Va. L. Rev. at 193-94) This Court's own description of the the "theory of the complaint" was "that 'dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control.'" (332 U.S. at 227-28) That such conduct may violate Section 1 "is hardly a startling or disputable proposition and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to section 1." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 29)

Although *Yellow Cab* can correctly be read more narrowly than its language at first suggests, Professor Areeda has remarked that the case demonstrates "the tendency of judicial language, once launched, to continue in life independent of its roots or policy." (Areeda, *supra*, at 406) Within the year, *Yellow Cab's* broad language was quoted with approval in *United States* v. *Griffith*, 334 U.S. 100 (1948) and *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948). Although both cases involved clear Section 2 violations, the Court relied without analysis on its prior language to find defendants liable under Section 1 as well.

Yellow Cab was next invoked three years later in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). There, a liquor distributor charged that two wholly-owned Seagram subsidiaries had conspired to set maximum resale prices. In an opinion primarily concerned with whether an agreement on maximum prices should be treated as a *per se* violation of the antitrust laws, Justice Black also reversed the lower court's decision that such an agreement by commonly-owned subsidiaries does not violate Section 1. His brief discussion of the latter point concluded:

> "[T]his suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g. United States* v. *Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors." (340 U.S. at 215)

As with the earlier cases, the commentators have argued that Justice Black's reliance on the intra-enterprise conspiracy doctrine was unnecessary to the result in *Kiefer-Stewart*. They have observed that the plaintiff distributor could have prevailed on the theory of a coerced conspiracy between the Seagram subsidiaries and itself. (Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 45; *but see* Handler & Smart, *supra*, 3 Cardozo L. Rev. at 31). Justice White apparently believed that the plaintiff in *Kiefer-Stewart* had been part of the conspiracy, when he later observed that the case "made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble-damage suit." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 143 (1968) (White, J., concurring).

Kiefer-Stewart was followed the same year by *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), where the Court once again repeated without analysis its view that affiliated companies could be found liable under Section 1. The facts are significant, however, since American Timken was alleged to have conspired with two foreign affiliates, neither of which was majority owned. In addition, there was

evidence that the alleged conspiracy predated the agreements under which the corporations became affiliated. (*See* Note, *supra*, 75 Mich. L. Rev. at 722; Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 Duq. L. Rev. 63, 72-73 (1975)) Even more significant is the fact that *Timken* was the first occasion when some members of the Court questioned the wisdom of the intra-enterprise conspiracy doctine.

Justice Jackson, in a dissent joined by Justice Frankfurter, asserted that the majority had placed "too much weight on labels" by allowing its result to turn on whether Timken operated through divisions or separately incorporated subsidiaries. (341 U.S. at 607) He observed that "[i]t is admitted that if Timken had, within its own corporate organization, set up separate departments to operate plants in France and Great Britain, as well as the United States, 'that would not be a conspiracy. . . .'" (*Id.* at 606) Nevertheless, "[t]he doctrine now applied to foreign commerce is that foreign subsidiaries organized by an American corporation are 'separate persons,' and any arrangement between them and the parent corporation to do that which is legal for the parent alone is an unlawful conspiracy." (*Id.* at 606-07) Accurately foreseeing the adverse repercussions of such arbitrary distinctions, Justice Jackson predicted that the Court's decision would "restrain more trade than it will make free." (*Id.* at 608)[21]

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[21] The Justice Department has provisionally consented to the entry of an order terminating the final judgment in *Timken*. Noting that American Timken now operates its British and French units as divisions, the Department stressed that "[t]he decree . . . has had no practical impact, other than to deter Timken from organizing new subsidiaries in England or France" and that "[t]here are . . . perfectly lawful and legitimate reasons why a domestic corporation might wish to operate overseas through separately incorporated subsidiaries rather than through divisions." It concluded that "there is no good reason whatever to attach different antitrust consequences to

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B. The more restrictive scope of the recent rulings.

More than a decade passed after *Kiefer-Stewart* and *Timken* before this Court again considered the intra-enterprise conspiracy doctrine. When it did so, it veered from the breadth of the earlier cases. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court reversed a finding of conspiracy between Sunkist and two of its affiliates, "even though they have formally organized themselves into three separate legal entities." (*Id.* at 29) The Court reasoned that, "[t]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers.... There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." (*Id.*)

The Court's focus in *Sunkist* on "economic significance," rather than "organizational distinctions that are of *de minimis* meaning and effect," appears inconsistent with the broad language of the earlier cases. Nevertheless, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), a plurality of the Court seemed to return to the prior approach. In that case, International Parts and several affiliated companies and individuals were charged with violating Section 1 through the use of restrictive franchising arrangements. The lower court had granted summary judgment for defendants on the ground there was no evidence they had "competed with each other or acted in any manner other than as a single integrated business." (376 F.2d 692, 699 (7th

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corporate activities executed through a wholly-owned subsidiary versus those executed through a corporate division." (Memorandum of the United States in Response to the Motion of the Timken Company to Terminate the Final Judgment at 7-8 (May 20, 1983), *United States* v. *Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio) (footnote omitted)).

Cir. 1967)) Justice Black, writing for four Justices, reversed this holding in a single sentence:

> "But since [defendants] availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." (392 U.S. at 141-42, citing *Timken* and *Yellow Cab*)

Importantly, however, the Court went on to hold that a conspiracy also existed between the defendants and the plaintiff since the latter had been coerced into its restrictive franchise arrangement. (392 U.S. at 142) Accordingly, none of the four separate opinions in *Perma Life*—representing the views of Justices White, Marshall, Fortas, Harlan and Stewart—found it necessary to rely on, or even mention, the intra-enterprise conspiracy doctrine.

The Court's most recent consideration of the doctrine in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), again suggests a more restrained approach to its application. In that case, the Court refused to find a conspiracy based on marketing discussions between Citizens & Southern and a group of correspondent branch banks that were five percent owned. The Court concluded that the challenged discussions were an integral part of "the sharing of expertise and information which was at the heart of the correspondent associate programs." (*Id.* at 114) It distinguished the situation where "independent competitors hav[e] no permissible reason for intimate and continuous cooperation and consultation." (*Id.* at 113) As in *Sunkist*, the Court's language indicates that considerations of economic reality and antitrust policy should guide the application of the intra-enterprise conspiracy doctrine.[22]

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[22] Concededly, *Citizens & Southern* invoked the earlier intra-enterprise conspiracy decisions by stating that "[t]his Court has held that even commonly owned firms *must* compete against each other, if they hold themselves out as distinct entities." (*Id.*

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Particularly in light of *Sunkist* and *Citizens & Southern*, this Court should take a fresh look at the sweeping statements in its earlier opinions, which put at risk most parent-subsidiary relations. The formulation of a new, clear and principled rule, which addresses the grave deficiencies in the intra-enterprise conspiracy doctrine, is required to eliminate the escalating confusion among the circuits that the present doctrine has generated.

III. The Lower Courts Have Developed Conflicting And Unworkable Tests For Applying The Intra-Enterprise Conspiracy Doctrine.

Confronted by the tension between the broad language in this Court's early intra-enterprise conspiracy opinions and the mounting criticism they have engendered, the lower courts have struggled to fashion suitable limiting standards for invoking the doctrine. At least four divergent tests have been articulated.[22] None of these tests has proved workable

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at 116-17, citing, *inter alia*, *Kiefer-Stewart*; emphasis added) This statement is puzzling, however, since it considerably overstates *Kiefer-Stewart*, which merely held that such corporations may not agree *not* to compete.

[22] No separate treatment is given in this brief to a fifth test, the so-called "absolute" rule, which uncritically gives effect to this Court's early opinions by holding that a parent and its wholly-owned subsidiary are always capable of conspiracy. *E.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs. Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978). *But see White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F 2d 1093, 1094-95 n.1 (3d Cir. 1972). Such an absolute rule is inconsistent with *Sunkist* and *Citizens & Southern*, which found no conspiracy among the affiliated corporations involved there. The rule is also untenable as a theoretical matter, since it turns perfectly legitimate communications among affiliates into self-

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in practice or defensible from the standpoint of sound antitrust theory. Their cumulative effect has been to splinter the intra-enterprise conspiracy doctrine into inconsistent rulings, to stimulate ever-increasing litigation, to frustrate intelligent business planning, and to underscore the need for a fundamental reappraisal of the doctrine by this Court.

A. The "all the facts and circumstances" test.

The test employed by the Seventh Circuit illustrates the inability of the lower courts to develop a rule for applying the intra-enterprise conspiracy doctrine that is sound in both practice and principle. Aptly described as the "all the facts and circumstances" test,[24] it allowed the jury to weigh nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; Cert. App. A-11; emphasis added) Although advanced as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem," the Seventh Circuit itself acknowledged "the uncertainties that necessarily exist" in this approach. (*Id.* at 318; Cert. App. A-12) Indeed, thirty-five years after *Yellow Cab*, the court characterized its test as still in an "early and unsettled stage of development" and as depending on a list of

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proving conspiracies. It is "like condemning the bi-sexual oyster for incest." (Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L. J. 5, 27 (1963); *see also* Note, *supra*, 75 Mich. L. Rev. 717, 727-29 (1977)) Not surprisingly, neither respondent nor the courts below suggested the adoption of such an approach.

[24] Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. In addition to the Seventh Circuit, this test has been adopted on occasion by the Eighth and Ninth Circuits. *E.g.*, *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973).

"various unranked factors" that may either "expand or contract." (*Id.*, Cert. App. A-11, A-12)

Corporate managers and their counselors cannot respond intelligently to such a situation, as petitioners' plight demonstrates. Relying on the Seventh Circuit's earlier ruling in *Photovest Corp.* v. *Fotomat Corp.*, *supra*, petitioners argued below that no finding of parent-subsidiary conspiracy was supportable under the five "relevant factors" listed in that decision. Rather than apply those factors, however, the court of appeals approved a new nine-factor charge to the jury, which omitted three of the five earlier factors and added several that *Photovest* had ignored. Handler and Smart correctly point out that such an unsettled and unsettling approach gives the intra-enterprise conspiracy doctrine "no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. . . . [W]here the case is tried to a jury, the jury should not be left adrift in an uncharted sea to determine whether separate but affiliated companies function as a single economic unit." (3 Cardozo L. Rev. at 59-61)

Not only does the "all the facts and circumstances" approach eliminate any predictability of result, but the factors relied on by the court in the present case favor the wrong result. By subjecting parent and subsidiary to greater antitrust risk on the basis of how much "separation" they maintain in the conduct of their businesses (691 F.2d at 320; Cert. App. A-16), the test discourages parent corporations from allowing their subsidiaries to make independent decisions about their operations. As noted (pp. 20-21 *supra*), this perverts the stated goal of the intra-enterprise conspiracy doctrine and inhibits the efficiencies to be derived from decentralized management.[25]

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[25] Even iron-handed control over the subsidiary has its risks. Once the parent and subsidiary are sued, counsel must be careful not to overemphasize the close relationship between the two, since "the same facts on which the parent will rely to show that it is legally incapable of conspiring may well be relied on

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At bottom, the Seventh Circuit's emphasis on separation versus integration of operations rests on a false premise. The court correctly seeks to avoid unwarranted distinctions between unincorporated divisions and incorporated subsidiaries. But it incorrectly assumes that, because divisions are *legally* integrated with their parent, they are also *managerially* integrated. In actuality, divisions can be operated in just as decentralized a fashion as subsidiaries. (Peters & Waterman, *supra*, Ch. 7) Consequently, the court errs in attempting to draw meaningful distinctions between divisions and subsidiaries based on factors that look to the separation of operational control.

This is brought home by an examination of the evidence relied on by the court of appeals to rationalize the verdict below. The court of appeals cited the fact that Copperweld acquired Regal to enter a new market where Regal continued to operate, thereafter left substantial autonomy in local management who made their own sales and supply arrangements, and compensated that management primarily on the basis of Regal's profits. (691 F.2d at 320; Cert. App. A-16-17) Each of these facts could have existed had Copperweld decided to continue Regal as an unincorporated division and did exist for those operational units Copperweld maintained as divisions. As a consequence, the result below forces the "all the facts and circumstances" test back upon the artificial distinction between division and subsidiary that the court sought to avoid, and vitiates any claim the test might make to provide a principled resolution of the existing confusion.

B. The "holding out as competitors" test.

It is a measure of the illogic in the "all the facts and circumstances" test that the instructions approved by the

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by plaintiff's counsel to argue that the requisite combination, contract, or conspiracy under section 1 has been established." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 60; footnote omitted)

Seventh Circuit did not ask the jury to consider the one factor cited by this Court as "especially applicable" to a finding of intra-enterprise conspiracy—whether defendants "hold themselves out as competitors." *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, *supra*, 340 U.S. at 215. Yet it was undisputed that Copperweld and Regal neither held themselves out as competitors nor in fact competed. (*See* p. 4 n.3 *supra*) And petitioners specifically requested that the jury be instructed to weigh the absence of such competition, citing the trial court to this Court's *Kiefer-Stewart* language. (Defendants' Second Revised Request For Jury Instructions, No. 26).

Because of the importance given to the "holding out" factor in *Kiefer-Stewart*, some lower courts have indicated that commonly controlled corporations are not capable of conspiring unless they have held themselves out as competitors.[26] Indeed, scarcely four months after *Copperweld* was decided, another panel of the Seventh Circuit concluded in an opinion by Judge Posner that Section 1 conspiracy allegations were insufficient, in part because:

> "[T]he complaint does not allege that the affiliates, despite being owned in common, hold themselves out as competitors, as is probably required for a conspiracy among affiliated corporations to be a per se violation of the antitrust laws." (*University Life Ins. Co.* v. *Unimarc,*

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[26] *E.g.*, *J.T. Gibbons, Inc.* v. *Crawford Fitting Co.*, 704 F.2d 787, 793 (5th Cir. 1983); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-44, 1046 (E.D. Mich. 1976); *Call Carl, Inc.* v. *BP Oil Corp.*, 403 F. Supp. 568, 572-73 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 & n.6 (E.D.N.Y. 1970), *aff'd per curiam*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922 (1972). *But see William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110, 117 (E.D.N.Y. 1976).

Ltd., 699 F.2d 846, 852 (7th Cir. 1983), citing *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975)).

Judge Posner's reliance on the "holding out as competitors" test, as well as his failure to make any mention of the *Copperweld* decision, dramatizes the conflict among, and even within, the circuits. His decision also points up the practical importance of the standard adopted. Application of the "holding out" test, as Handler and Smart note, "would eliminate a whole category of lawsuits where plaintiffs have attempted to gain treble damages by alleging conspiracy between a parent and a subsidiary which do not compete" (3 Cardozo L. Rev. at 54-55), including the instant case.

Although Handler and Smart, along with other commentators,[27] regard such a containment of the intra-enterprise conspiracy doctrine with favor, they acknowledge that the "holding out" test leads to some of the same unpredictability that plagues the "all the facts and circumstances" test. For example, "what are the indicia of a subsidiary holding itself out as a competitor with its parent or affiliate? . . . Conversely, would a corporation be capable of conspiring under this doctrine where it competed with its parent, subsidiary or affiliate, but emphasized the fact of affiliation to the industry?" (3 Cardozo L. Rev. at 55; *see also* Note, *supra*, 95 Harv. L. Rev. at 669-70)

C. The "third party restraint" test.

Respondent has urged this Court to adopt still a third standard for invoking the intra-enterprise conspiracy doctrine; namely, where the activities of the affiliated firms are "designed to restrict the trade of third parties. . . ." (Br. in Opp. at 13) The court of appeals, however, did not rely on such a standard in reaching the result below. Nor did the district court include such a factor in its instructions to the jury, although respondent specifically requested such a charge. (*Compare* 691 F.2d at 331-32; Cert. App. A-40-41 *with*

[27] *E.g.*, Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 37-38.

Plaintiff's Revised Request For Jury Instructions, No. 18) Most important, not one of this Court's opinions has ever mentioned such a "third party restraint" test.

Rather, the test derives from the attempt in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* to reconcile this Court's early decisions in *Yellow Cab, Kiefer-Stewart* and *Timken*. The Committee expressed the view that "[t]he substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1." (*Id.* at 34) At the same time, the Committee concluded that:

> "The use of subsidiaries is generally induced by normal, prudent business considerations. . . . To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare.
>
> • • •
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> "Insofar as the decision in *Kiefer-Stewart*, or the decree in *Timken*, may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (*Id.* at 34, 36)[28]

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[28] The "third party restraint" test has been invoked in two district court rulings. *REA Express, Inc.* v. *Alabama Gr. S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *Thomsen* v. *Western Electric Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982). As respondent has noted (Br. in Opp. at 14, 21), the Antitrust Division also suggested at one time that it might rely on such a standard. However, the government's brief supporting the petitioner points out that "the Division has not developed or pursued that suggestion in its enforcement activities" and now urges that this Court hold that corporations under common

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The "third party restraint" test has rightly been criticized as both "unworkable and unreal." (*See Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 588 n.20; Note, *supra*, 95 Harv. L. Rev. at 673 n.70) The fundamental problem with the test is that nearly every parent-subsidiary agreement is likely to result in some coercion or restraint on third parties. Consequently, respondent's attempt to distinguish intracorporate agreements that purportedly deal only with "internal management affairs" (Br. in Opp. at 13) is meaningless. For example, agreements between a parent and its wholly-owned subsidiary regarding the prices the subsidiary should charge, or whether it should continue in a particular geographic or product market, are the type of "internal" decisions that no one legitimately can contend should constitute Section 1 "conspiracies." Yet the prices charged by the subsidiary, the products it manufactures, and the markets in which it sells will have important repercussions for a host of third parties, including suppliers, customers and competitors.[29]

Precisely because agreements to fix prices or to allocate markets among unaffiliated corporations have such clear effects on third parties and competition generally, they have long been held by this Court to be *per se* restraints of trade. Under the "third party restraint" standard, however, such

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control are incapable of Sherman Act conspiracy, without regard to any effect on third parties. (Br. of U.S. at 16 n.34, 22-23).

[29] *Reisner* v. *General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982), is a good example of legitimate "internal" discussions that may have an effect on third parties. Rejecting plaintiff's claim that General Motors had conspired with its wholly-owned subsidiary, Opel, to refuse to sell components to the plaintiff, the court concluded that the alleged conduct was "essentially consultation between General Motors and Opel concerning company-wide General Motors policies for the sale of General Motors engines to other manufacturers." (511 F. Supp. at 1173)

agreements between a parent and its wholly-owned subsidiary would be excused from all liability as "internal management" decisions. By contrast, petitioners' "conspiracy" to interfere with respondent's supply contract, conduct that would normally be the subject of state tort law, leads to significant treble damage liability.[30]

Finally, by focusing on whether there is a "restraint" on third parties, respondent's standard confuses the issue of whether a parent and its wholly-owned subsidiary have the capacity to conspire with the issue of whether the "conspiracy" results in any restraint of trade. In fact, respondent's standard even misconceives the latter issue, which is properly whether there is a restraint on "competition, not competitors." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

D. The "sole decisionmaker" test.

Finally, some courts have endorsed the "sole decisionmaker" rule, which holds that there is no capacity to conspire when affiliated corporations are owned and controlled by one person who has the power to make decisions as to both.[31] This test correctly focuses on ultimate legal control, rather than organizational formalities. If an individual

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[30] The "third party restraint" test leads to other inconsistencies. Essentially identical conduct is treated as "external" and "internal" in different cases. *Compare Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) *with Universal Lite Distributors, Inc.* v. *Northwest Indus. Inc.*, 452 F. Supp. 1206, 1216 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979).

[31] *Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *In re Mid-Atlantic Toyota Antitrust Litigation*, *supra*, 560 F. Supp. 760, 767 n.12 (D. Md. 1983) (ruling "that as a matter of law a 'one-man show' exception exists to the general rule of intra-enterprise conspiracy").

has lawfully acquired control over certain assets, the individual's exercise of control should not be deemed conspiratorial (and should not implicate Section 1) simply because he has organized those assets into separate corporations.

Unfortunately, the courts have not given full scope to the underlying logic of the "sole decisionmaker" rule. Where a subsidiary is wholly owned, whether by an individual or a corporation, a single "person" has the sole legal and economic power to control its conduct, and the rule should apply. Concededly, when the owner is a corporation, it must act through its principal officers. But even an individual owner of a subsidiary corporation must generally carry out his wishes through subordinate officials, though he will still qualify as a "sole decisionmaker" under the existing test.[11]

Petitioners' situation underscores the deficiency in the current application of the "sole decisionmaker" test and points the way to the proper rule. The test was not applied here—although Regal was wholly owned by Copperweld, the same individual served as Chairman and Chief Executive Officer of both corporations, and all Regal's directors were officers or directors of Copperweld—because of the purely formal fact that the parent was a corporation rather than an individual. The better rule would recognize that only a single "decisionmaker" is involved in both situations and that the existence of separate corporations should not determine the outcome under Section 1.

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[11] In fact, in the *J.T. Gibbons* case, the Fifth Circuit apparently expanded the "sole decisionmaker" rule to a situation in which two individuals, instead of one, made the decision being challenged. "This lack of competition [between commonly-owned subsidiaries], in combination with the fact that this alleged conspiracy is, as a practical matter, the unilateral decision of the *two* men who own these companies, convinces us that . . . [the companies] lacked the capacity to conspire." (704 F.2d at 795; emphasis added).

IV. This Court Should Hold That A Parent And Its Wholly-Owned Subsidiary Cannot Conspire Together In Violation Of The Sherman Act.

In the final analysis the lower courts have failed in their efforts to formulate a sound approach to the intra-enterprise conspiracy doctrine because they have been unable, in Judge Cummings' words, to re-examine "the doctrine root and branch." (691 F.2d at 318; Cert. App. A-11) What is required is a return by this Court to first principles—to the recognition that the doctrine should rest on "substance rather than form" (*Yellow Cab*, 332 U.S. at 227), and that "grave legal consequences [should not rest] upon organizational distinctions that are of *de minimis* meaning and effect. . . ." (*Sunkist*, 370 U.S. at 29) We urge this Court to hold as a matter of law that a parent and its wholly-owned subsidiary cannot alone provide the plurality of actors necessary to satisfy the "contract, combination . . . or conspiracy" requirement of Section 1 of the Sherman Act. This rule would remedy the deficiencies in the present doctrine and place it on a basis consistent with sound antitrust and economic principles.[33]

First, the proposed rule would put an end to the artificial distinction between unincorporated divisions and wholly-owned subsidiaries and to the confused rulings it has generated. It would recognize that a parent and its wholly-owned subsidiary, no less than a parent and its unincorporated division, have a unity of interests in legal, economic and practical terms. In both forms of corporate organization,

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[33] The same principles would support this Court's adoption of a broader rule that would preclude a finding of "contract, combination . . . or conspiracy" whenever a parent owns more than 50% of a subsidiary, or where two subsidiaries are more than 50% owned by a common parent. This approach is consistent with other regulatory and statutory approaches to the "control" issue. *See, e.g.*, 1977 *Antitrust Guide For International Operations* at 12-13; *ABA Antitrust Consent Decree Manual* 52-53 (1979); 16 C.F.R. § 801 (1983).

ultimate decision-making authority—including the authority to select a divisional or subsidiary format—is centered in the same hands. The economic objective is also the same: increasing the aggregate profits of the larger economic enterprise. Third-parties also treat them identically so that, except for the legitimate efficiencies achievable through separate incorporation, the effect on the market is identical.

A test of legal control would thus recognize that separate incorporation is a matter of form, not substance. Separate incorporation does not alter the basic unity of legal and economic interests and does not make the wholly-owned subsidiary "independent" in any meaningful antitrust sense.[34] Consequently, where a corporation has not violated the antitrust laws in acquiring control over a group of productive assets, its decision to organize them into separate corporations does not implicate Section 1. If one company has complete legal authority to control the actions of another, an "agreement" between these two legal "persons" adds nothing to the market power of the first and does not affect the autonomy or economic independence of the second. The legal control test would end the formalistic reliance of the courts on a distinction that is irrelevant to antitrust policy.

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[34] The essence of Section 1 law is to prevent independent competitors from agreeing to engage in conduct that would be against each firm's self-interest if undertaken independently, and that would be in the firm's interest only if undertaken collectively. When viewed in light of this statutory purpose, it is clear that an "agreement" between a parent corporation and a wholly-owned subsidiary is not the sort of conduct that Section 1 was intended to address. The subsidiary has a fiduciary duty to act in the interests of its sole shareholder—the parent corporation. Independent of any "agreement," the interests of the parent and the subsidiary are undivided. Their common goal is to maximize the profits of the enterprise, and the existence of an "agreement" does not suggest that a threat to competition has thereby been created.

Second, the rule would permit business enterprises to select the form of organization that best advances efficiency. If the increased risk of antitrust liability causes a corporation to forgo the benefits of separate incorporation, consumer welfare will not increase, and it may well be diminished. *Cf. Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("[The floor debates] suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.' R. Bork, *The Antitrust Paradox* 66 (1978)") If the corporation decides to opt for separate incorporation, the intra-enterprise conspiracy doctrine may cause the parent to exercise more control over its subsidiary's operations than is optimal, thus depriving the firm and ultimately consumers of the efficiency benefits of more decentralized management. (*See generally* O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975) (discussing benefits of decentralization); T. Peters and R. Waterman, *In Search of Excellence, supra*). Conversely, the doctrine may discourage normal parent-subsidiary cooperation, thus depriving consumers of operational efficiencies that otherwise might be achieved. The legal control test, by eliminating a risk factor unrelated to "competition based on efficiency" (*Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 623 (1975)), would allow businesses to achieve the efficiencies of separate incorporation without the costs that result from needlessly interfering with managerial decisions.[35]

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[35] The antitrust laws generally do not regulate the details of business decisions; these laws allow individual businessmen the freedom to structure their operations in the manner that they believe will be most efficient. As Professor Sullivan states: "basic decisions affecting resource allocation, efficiency, innovation and conservation are usually left to private decision-makers and regulated only by the forces of the market." (Sullivan, *supra*, at 20). The same point was made by the government in supporting the petition: "There is no need to invoke the antitrust laws to correct a firm's mistaken appraisal of its own self-interest, since market forces will accomplish that task." (Br. of U.S. at 19)

Third, the proposed rule would be fully consistent with the statutory scheme of the Sherman Act and the antitrust laws generally. Since Section 1 is concerned with collaborative practices in which economic resources under one source of legal control are joined with those of another, its stringent standards—including the threat of *per se* liability—should not be construed to apply where the "conspirators" are part of a single entity. Rather, the conduct of the enterprise should be analyzed under Section 2, which contains the more rigorous proof requirements appropriate to assessing the market power and effects of a single economic enterprise.[36] Under a legal control test, a parent's choice of corporate form would no longer shift the standard of liability from Section 2 to Section 1. Instead, the "purposeful distinction" made by Congress between these two sections would be preserved. (*Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 588-89).

In applying other provisions of the antitrust laws, the courts and the enforcement agencies have recognized that a parent corporation and its wholly-owned subsidiary constitute a single economic entity. For example, when analyzing an acquisition under Section 7 of the Clayton Act, the courts consider competitive overlaps between subsidiaries of the parties to the acquisition, as well as overlaps between the parties themselves. *See, e.g., United States* v. *Waste Management, Inc.*, 1983-1 Trade Cas. ¶ 65,347 (S.D.N.Y. 1983). Similarly, Federal Trade Commission regulations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976), define a "person" as all entities under common control and subject an acquisition made through a subsidiary to the same premerger reporting requirements as an acquisition made directly by the parent. (16 C.F.R. § 801.1(a)(1) (1983)) On the other hand, mergers among wholly-owned subsidiaries of the same parent are expressly exempted from the

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[36] In this regard, subsidiary corporations are considered together with their parent corporations for purposes of determining market power in Section 2 cases. *E.g., United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966).

Commission's rules. (16 C.F.R. § 802.30 (1983)) Under the better-reasoned Robinson-Patman Act cases as well, a parent and a wholly-owned subsidiary are treated as a single economic unit."

The United States, in its amicus brief on behalf of both the Justice Department and the FTC, has stressed that the legal control test "would not impair the government's antitrust enforcement capabilities" and that "[a]nticompetitive conduct by a parent and its controlled subsidiary would still be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances." (Br. of U.S. at 16) The only effect of the proposed rule would be to put an end to the improper claims of private plaintiffs who rely on the intra-enterprise conspiracy doctrine "to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Sections 2's monopolization standards." (691 F.2d at 317; Cert. App. A-10) Private plaintiffs who could not prove the requisite market effects would be relegated, as here, to their appropriate state law remedy. As Handler and Smart stress:

> "[T]he common law of unfair competition reaches such behavior as . . . interference with contractual relations. While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the very same unfair competitive practices are carried out by a company through its division." (3 Cardozo L. Rev. at 71)

" *See Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), where the Fifth Circuit held that a transfer between a parent and a wholly-owned subsidiary can never be considered a "sale" for Robinson-Patman purposes. *See also Emil J. Lauter Co.* v. *Brunswick Corp.*, 532 F. Supp. 983 (N.D. Ill. 1982).

Finally, the legal control test would provide clear guidance to the business community and promote judicial economy. Businesses would no longer need to be concerned that communications and coordination between a parent and its subsidiaries would later be deemed a "conspiracy" in restraint of trade. Nor would corporate officials face the uncertain results that flow from the case-by-case application of an "all the facts and circumstances" or "external effect" test. And, the courts would no longer be required to engage in a wide-ranging factual inquiry to answer subtle questions about operational independence that are irrelevant to antitrust policy.

For all these reasons, this Court should re-examine its earlier pronouncements and hold that a parent and its wholly-owned subsidiary cannot alone supply the plurality of actors necessary for the "contract, combination . . . or conspiracy" requirement of Section 1 of the Sherman Act. Such a result would end the irrationality and confusion that have long plagued the business community and burdened the courts. It would once again focus the strictures of Section 1 on collusive conduct by truly independent, rather than commonly-owned corporations.

CONCLUSION

The judgment below should be reversed and the case remanded for entry of judgment in favor of petitioners on the antitrust issue.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether petitioners, autonomously operated parent and subsidiary corporations, combined or conspired in violation of Section 1 of the Sherman Act, when they acted in concert to coerce third parties to boycott a new competitor.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Respondent, Independence Tube Corporation ("Independence"),[1] filed this action in 1976 in the United States District Court for the Northern District of Illinois, alleging, *inter alia*, that petitioners Copperweld Corporation ("Copperweld") and Regal Tube Company ("Regal") and others engaged in a combination or conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. (15 U.S.C. § 1) The complaint alleged that petitioners' objective was to induce or to coerce the Yoder Company ("Yoder") and other firms to refuse to deal with Independence and to thereby prevent

[1] Independence has no parent or subsidiary corporations.

Independence from entering the structural steel tubing market in competition with Regal. Petitioners each filed counterclaims charging, *inter alia*, misappropriation of confidential information and trade secrets. At the conclusion of a ten-week trial, Senior Judge Hubert L. Will directed a verdict against petitioners on their counterclaims. The jury returned a verdict against petitioners on the antitrust and other claims, and that verdict was upheld by Judge Will on post-trial motions. The Court of Appeals for the Seventh Circuit unanimously affirmed the verdict and the District Court's judgment in all respects.

1. Statement of Facts

The following statement of the facts provides a more complete and accurate description of the relevant facts and circumstances of this case than that found in petitioners' brief:

Regal Acquisition. Regal, a manufacturer of structural steel tubing, was acquired by Copperweld from Lear Siegler, Inc. ("LSI") in 1972 as an "on-going business." Its acquisition represented an investment by Copperweld in a new market with a firm which "had its own management" and could operate independently. (Stip. 10, 15; T. 3029)[2] That management was to remain intact, Regal's manager was promised autonomy, and his compensation was linked to Regal's profits for which he alone would be responsible. Regal operated as a separate corporation and as a separate profit center because Copperweld's president, Phillip Smith, wanted it to "stand on its own two feet." (PX 995, 1081; J. App. A-111-13; T. 445-46, 3029-35, 3046-47, 3135-36, 3139, 4956-59, 4976-82, 6943-44) Bedford Foster, as president of Regal, assumed the "sole responsibility and authority over the entire operations" of the firm and testified that "in all material respects" the operations of Regal were controlled in Chicago, not in Pittsburgh where Copperweld was located. (PX 579; J. App. A-103; T. 1762-65)

[2] In this brief, "Cert. App." refers to petitioners' Appendix filed with their Petition for Writ of Certiorari; "J. App." refers to the parties' Joint Appendix; "Pet. Br." refers to Brief of Petitioners; "Stip." refers to Stipulation of Facts; "T." refers to Trial Transcript; "PX" refers to Plaintiff's Trial Exhibit; and "DX" refers to Defendants' Trial Exhibit. Reference to *"amici"* herein is to the *amici* generally who have filed briefs in support of petitioners.

All of Regal's management, employees and assets were in Chicago. Regal continued to have responsibility for its own customer and supplier relationships; operated its own manufacturing facilities; set its own prices; sold to Copperweld affiliates at market prices; conducted its own trade association activities; handled its own labor and personnel matters; conducted its own advertising and marketing studies; selected its own equipment; billed and collected its own receivables; maintained its own bank accounts, financial records, pension and benefit plans; and conducted its own engineering programs, product development, strategic business planning and acquisition searches. (Stip. 129-30, 170; PX 30, 34, 36, 43, 117, 133, 199, 247, 334, 473, 475, 998; J. App. A-8-37, 54; DX 574-87, 698-701; T. 2499, 2887-88, 2907, 2913, 4273-74, 4298, 4597, 4687, 4713-15, 4906-09, 4914, 4954-56, 4974, 5316, 5319, 5708, 6944, 6953-56)

Coercion of Independence Suppliers. Regal's president, David Grohne, left Regal when it was acquired by Copperweld and joined LSI. Later in 1972, he became involved in establishing Independence as a new structural tubing producer and subsequently left LSI. (Stip. 21, 26, 33-34; T. 207-12) When Foster of Regal learned that Independence was being formed, he reported the fact to Smith of Copperweld. They were aware of Grohne's reputation as a "price cutter," and Smith observed that the new enterprise "could create a problem for Regal." (PX 393; J. App. A-82; T. 1308, 1772-75) At that time, there were only a "few competing companies" that were able to produce the range of tubing sizes that Independence intended to produce, and Regal's market strategy was to "emphasize pricing stability" in that size range. (PX 30, 34, 448; J. App. A-16, 97) According to Copperweld's documents, it was the news of Independence's planned entry into competition with Regal which "led Bedford Foster to ask [Smith] to get something moving" with respect to Independence. (PX 1081)

Petitioners first asked their lawyers whether a noncompete provision in the acquisition agreement between LSI and Cop-

perweld could somehow be used to "stop Grohne," but Smith and Foster were advised by counsel that the "noncompete cannot be used against Grohne. . . ." (PX 394, 1055; J. App. A-83) Nevertheless, letters implying that Grohne was covered by the noncompete provision were prepared to be sent to Independence's potential equipment suppliers and financing sources. These letters threatened "any and all steps" to pursue petitioners' "rights" under the acquisition agreement and to protect Regal's alleged "trade secrets." (PX 168, 395; J. App. A-84; T. 6019, 6025) As Foster knew, however, and as William Jentes of the Kirkland & Ellis law firm later advised, Regal's operation "cannot be classified as involving trade secrets." (PX 1194; J. App. A-119, 122; T. 6049-51)

Petitioners retained a private investigator to conduct surveillance activities of Independence. When the investigator reported on February 19, 1973 that The Yoder Company ("Yoder") had just agreed to construct a $1,000,000 tube mill for Independence, Copperweld's Smith sent the previously prepared letters to Yoder, to the two other domestic mill manufacturers, to Chicago's two largest banks and to one of Independence's major financial backers. Foster provided Smith with addresses and other information concerning Yoder and the financial backer. Foster also advised Smith that Independence was negotiating with two industrial real estate firms with whom Regal had dealt in the past. Smith promptly sent additional letters to these firms on February 21, 1973. (PX 66, 132, 141, 168, 214, 236, 408, 413, 431, 443, 446, 718; J. App. A-38, 74, 79, 86, 92-95, 106; T. 1786-88)

Upon receiving the letter from Smith, Yoder recognized the intent was to "scare off potential suppliers and customers." Yoder promptly "complied with his wishes" and breached its contract to supply a mill to Independence, because it did not want to offend its "good customer and prospect, Copperweld." Yoder expected additional business from petitioners because of its refusal to deal with Independence. However, Yoder later protested that it had not received sufficient consideration from Regal on subsequent equipment purchases despite Yoder's

compliance with the boycott effort. Foster of Regal assured Yoder that it would receive proper consideration on future projects. (PX 77, 78, 94, 98, 411; J. App. A-88; T. 1113-14, 1118-19, 1124-26, 1428-29, 1432-34, 2659-61)

Independence protested to Copperweld that Yoder had breached its agreement to build a tube mill for Independence because of the Copperweld letter and requested that Copperweld confirm to Yoder that Grohne was not covered by a noncompete agreement. Copperweld refused to contact Yoder to clarify the matter. Instead, Smith suggested they "keep the pressure on" and further remarked that "there is plenty we can do to block Grohne." (PX 430, 433, 1060; J. App. A-90-91, 117) Petitioners subsequently sent second and third "notice" letters to some suppliers and met with others to discourage them from dealing with Independence under threat of litigation or withdrawal of petitioners' business. (PX 90, 92, 223, 237-38, 448-49, 451-53, 740, 1100, 1105; J. App. A-48, 97-99, 109; T. 498-502, 508-10, 1333-37, 1561-69, 2242-52, 2256, 2392-93, 2395-96, 2448-50, 2453, 2461-63, 2470-71, 2662-63, 2666-68, 2670, 2683-84, 4047-50)

Yoder's contract breach followed nine months of detailed negotiations with Independence. Independence was thus forced to attempt to locate another potential mill supplier and to begin negotiations anew. (Stip. 52, 119, 123; T. 315-18, 320) One of the remaining mill manufacturers, Abbey Etna Machine Company ("Abbey Etna"), had assured Regal's Foster that it "would certainly not be doing business" with Independence after it received the first of three letters from Copperweld. When Foster learned that Abbey Etna later agreed to supply a mill to Independence, he notified Smith of Copperweld and pointed out that the mill would cover "a most important part of our size range." Smith in turn told Abbey Etna's president that it would be "illegal" to supply the mill and threatened to sue both Abbey Etna and Grohne. (PX 448, 740; J. App. A-97, 109) Copperweld's attorneys had advised Smith that same day, however, that any such action would be

unsuccessful and would trigger a substantial antitrust counterclaim. Copperweld's law firm had previously warned of the danger of such an antitrust suit on the ground that petitioners "harrassed potential financial and equipment suppliers from doing business with him [Grohne], thus restricting competition." (PX 449, 481; J. App. A-99, 102) Nevertheless, Copperweld's general counsel, who was also a member of its board of directors, recommended that Grohne be "kept under continued surveillance and once he starts to operate or solicit business we should pounce on him." (PX 478; J. App. A-10)

Continental Illinois National Bank and Trust Company of Chicago had agreed to provide financing to Independence. After Smith was so informed by bank officials, he told them that petitioners were "considering discontinuing doing business with Continental" because of the bank's agreement to finance Independence. Copperweld counsel contacted the bank's president and its lawyers and stated that Copperweld would be filing an action against Independence. Thereupon, bank officials considered withdrawing the bank's loan commitment to Independence, and later refused to extend the term or increase the amount of the loan because of pressure from petitioners. Smith informed bank officials that he was "extremely angry" about the bank's dealings with Independence and that petitioners would be withdrawing their accounts. Subsequently, Copperweld and Regal closed their accounts at the bank. (PX 223, 658; T. 314, 499-503, 508-10, 2240-53, 2256, 2258-59, 2262-64, 2314-15, 2662-71, 2677-79, 2683-84, 2854, 2871-74, 3756-57)

When Regal learned that U. S. Steel Corporation was shipping steel to Independence in September 1974, it sent a letter to the company expressing "great concern" that U. S. Steel would supply Independence despite Regal's "long association" with U. S. Steel. At the same time, Copperweld and its general counsel made contacts with U. S. Steel in Pittsburgh expressing their "bitter disappointment" with the sales to Independence. U. S. Steel officials expressed "embarrassment," but made no commitment to stop dealing with Indepen-

dence completely. Soon thereafter, Regal "shut off" U. S. Steel as a supplier. (Stip. 146-47; PX 421, 562, 1100, 1105; T. 1333-37, 2137-43, 2147-48, 2392-96, 2433, 2448-53, 2457-66)

Injury to Competition. Petitioners' boycott efforts excluded Independence from the structural steel tubing market for at least nine months, and more probably a full year, and inhibited Independence's ability to effectively compete after its entry. Independence had been unable to start production before a steel shortage began, precluding Independence from obtaining a sufficient supply of steel. In addition, Independence was completely precluded from producing the larger sizes of tubing because the mill which it was finally able to obtain was smaller and weaker than the Yoder mill. As a result, Independence has been excluded from a portion of the market shared by very few firms, including Regal, and characterized by high prices and high profit margins. (PX 34, 52, 53, 770; J. App. A-16; T. 317-23, 328, 2399-2402, 2478-84, 6855, 6890-96, 8891-92, 9918-23)

Petitioners had recognized that Independence would be a "price cutter" and would likely introduce substantial price discounting in a market where price is the "primary determining factor to the customer." (PX 30; T. 1308) In fact, Regal limited its price increases beginning in March 1974, six months before Independence Tube began producing, so as not to "make it easy for Independence Tube to enter the market." (PX 43) But for petitioners' exclusionary efforts, that price moderation would have begun a year earlier.

Independence ultimately succeeded in bringing new price competition in tubing sizes where there had been high market concentration and little price competition. Regal attempted to preserve that price stability and to act as a price leader even after Independence entered the market. Nevertheless, throughout 1975 and 1976 Independence led a substantial price decline, forcing Regal and others to continually reduce their prices. Shortly thereafter, petitioners made unsuccessful overtures to acquire Independence. (PX 34, 106, 334, 473, 620; J. App. A-16; T. 352-54, 2313, 2477-84, 2891-2906, 3911-21, 4729-30, 6778-79)

2. Proceedings in the District Court

After presentation of the evidence at the liability trial, the court conducted an instruction conference with counsel for the parties. Petitioners tendered a jury instruction which provided in part:

> Sherman Act 1
> Legal Capacity of Regal and Copperweld to Conspire
>
> Further, with respect to Independence's allegation of a conspiracy between Copperweld and Regal Tube Company, I instruct you that before you may consider whether a conspiracy in fact existed between them, you must first determine whether these two companies are sufficiently distinct from each other to be separate actors in a conspiracy.
>
> * * * *
>
> A corporation as a matter of law may not conspire with its unincorporated division. However, under some circumstances a corporation may be legally capable of conspiring with its wholly owned subsidiary.
>
> * * * *
>
> If upon weighing all the factors listed above in light of the evidence presented at trial, you conclude that Regal Tube Company is not sufficiently distinct from Copperweld as an economic entity to be able to freely conspire with Copperweld, then you cannot enter a verdict in favor of the plaintiff on its antitrust claim under the Sherman Act based upon any alleged conspiracy between Copperweld and Regal. (Defendants' Revised Instruction 26)

Judge Will gave the foregoing instruction as requested by petitioners with minor modifications. (T. 8472-75)

The jury found that petitioners had formed a combination or conspiracy in violation of Section 1 of the Sherman Act which resulted in injury to Independence. The jury further

concluded that Yoder breached its contract with Independence but did not violate the Sherman Act.[3]

Although petitioners raised myriad issues in their post-trial motions, they did not contend that parent and subsidiary corporations should be held incapable of combining or conspiring with each other under the Sherman Act. In an extensive memorandum opinion, Judge Will concluded that petitioners had violated Section 1 of the Sherman Act, and he denied petitioners' post-trial motions in all respects. (Cert. App. B) As to the petitioners' "rationale" for contacting Independence's suppliers, the trial court stated "that the defendants' true motivation in writing to Yoder [and others] was to keep Independence out of the structural tubing market or to hamper its ability to compete there." (Cert. App. B-7; *see also* Cert. App. B-25)

3. The Seventh Circuit's Affirmance

The Court of Appeals for the Seventh Circuit unanimously upheld Judge Will's conclusions and affirmed the judgment in all respects. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982). Again, petitioners did not argue in their briefs that parent and subsidiary corporations were incapable of combining or conspiring under the Sherman Act. Rather, petitioners contended that they were not sufficiently separate in their operations to engage in concerted action with one another, and they complained that Judge Will's modification of their instruction had not adhered in every detail to *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

---

[3] The jury was not specifically asked to determine whether Yoder was part of the combination or conspiracy, apart from the other elements of the Sherman Act offense. The jury answered negatively to the following interrogatory concerning Yoder:

> Did Independence Tube Corporation establish by a preponderance of evidence that Copperweld Corporation, Regal Tube Company and The Yoder Company combined or conspired against Independence Tube Corporation in violation of the antitrust laws and thereby proximately caused injury to Independence? (Interrogatories to the jury on liability issues, dated Feb. 17, 1981)

In an opinion written by Chief Judge Cummings, the Court of Appeals concluded that the trial court's jury charge which concentrated on "the practical relationship between the parent and the subsidiary" was correct in that it "focuses on the proper question—namely, when the distinction between affiliation and integration is trivial and when it is significant." The court found that Judge Will's charge "emphasized to the jury that they were looking for real, rather than merely formal, distinctness." (691 F.2d at 318-19; Cert. App. A-11-13) The court then reviewed some of the evidence of the autonomy of Regal's operation as follows:

> (1) Regal had existed as a division of C.E. Robinson Company and of Lear Siegler before its acquisition by Copperweld, and that Copperweld intended Regal to "keep its ongoing business and keep serving the market and customers it was already serving."
>
> (2) The acquisition of Regal did not have the practical effect of enabling Copperweld to handle additional steps in its own manufacturing process (comparable to the forward integration found in *Photovest*), but established Copperweld in an entirely new line.
>
> (3) Regal management had real autonomy in both day-to-day and policy decisions.
>
> (4) Not only were Regal's expenses and revenues segregated but Regal's operating manager's compensation was based primarily on Regal profitability.
>
> (5) Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials—a fact relevant to the ability of the defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division. (691 F.2d at 320; Cert. App. A-16-17 (citations omitted))

The court found that petitioners' rationale for contacting Independence's suppliers was "probably specious," citing the observation of William Jentes, Copperweld's attorney, "that

Regal had taken no steps whatsoever" to preserve confidentiality. (PX 1194; J. App. 119-127) Thus, the court stated:

> [I]f notice rather than intimidation had been the purpose of Copperweld's campaign, one letter to Yoder would have served. A second and third were in fact sent. If protection of Regal's proprietary interest had been the rationale, *then Copperweld's actions were premature and probably specious.* We would therefore have affirmed the jury's findings if we had had to reach them on the antitrust appeal. . . . (691 F.2d at 325; Cert. App. A-27 (footnotes and citations omitted) (emphasis added))

SUMMARY OF ARGUMENT

The Court is presented here with the narrow question of whether a parent corporation and its autonomously operated subsidiary participated in a "combination" or "conspiracy" within the meaning of Section 1 of the Sherman Act when they engaged in concerted actions to coerce third persons to boycott a new competitor. Copperweld and Regal each used the economic leverage of its individual commercial contacts to persuade other firms to refuse to deal with Independence, which they expected to be a "price cutter" in the structural steel tubing market. They succeeded in precluding Independence's entry for a substantial period and in permanently excluding it from a segment of the market, thereby reducing product supply and frustrating price competition. This is the "concrete" case that the Court is called upon to decide, rather than the "abstract propositions of law" offered by petitioners. *Upjohn Co.* v. *United States,* 449 U.S. 383, 386 (1981).

I.

Section 1 of the Sherman Act prohibits "every" combination or conspiracy that unreasonably restrains trade. Separate though affiliated corporations are separate legal persons and provide the plurality of actors necessary to satisfy the literal requirements of the statute. However, whether parent and subsidiary corporations should be held capable of engaging in a combination or conspiracy in a particular case should ultimately turn upon a consideration of the objectives of the statute. One

of the principal objectives of Section 1 was to preserve competition by prohibiting concerted predatory conduct designed to prevent the entry of new competitors, precisely the type of activity involved in this case. Congress intended the broad common law terms "combination" and "conspiracy" to be interpreted liberally to achieve these statutory objectives. Indeed, the framers of the Sherman Act specifically recognized that anticompetitive results could be achieved by a combination of affiliated corporations, each of which is a "creature by itself." 21 Cong. Rec. 2571 (1890) (statement of Sen. Teller).

Some of the earliest decisions of this Court under Section 1 of the Sherman Act held that affiliated corporations which had engaged in concerted anticompetitive conduct constituted a "combination" under Section 1. *See, e.g., Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 74 (1911). In *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947), the Court refused to create an exemption for anticompetitive activities of affiliated corporations, stating that common ownership and control are "impotent" to liberate such a combination or conspiracy from the impact of the Act. This doctrine has been consistently reaffirmed by the Court in the succeeding decades, often at the urging of the United States as plaintiff or as *amicus curiae*.

The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955) described the essence of the Supreme Court decisions as prohibiting parent and subsidiary combinations which impose unreasonable restraints on the trade of "strangers to those acting in concert." The enforcement policy statements of the Antitrust Division of the Justice Department have consistently supported this position. The government's brief in this case represents the first time in almost a century of Sherman Act enforcement that it has urged the Court to exempt the predatory activities of affiliated corporations from Section 1 of the Sherman Act.

II.

The principles established by the decisions of the Court are rational and workable. The application of those principles by

the lower courts has involved a consideration of (1) whether the affiliated corporations functioned as distinct economic units, and (2) whether each corporation engaged in activities to unreasonably restrain the trade of third parties. This approach involves a realistic analysis of the actual operation of the separate corporations and is consistent with economic principles which recognize that an autonomous corporate entity engages in contractual and other business relationships which create an economic impact. When such corporations combine the leverage of their individual business relationships to strengthen an anticompetitive assault, as petitioners did here, the principles of the antitrust laws are transgressed. On the other hand, "actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1." *Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982). These principles are consistent with the Court's consideration of parent-subsidiary relationships in other areas of the law, which has always turned upon the fundamental policies of the particular statute involved and the indicia of corporate independence.

The lower courts have applied the doctrine developed in the Supreme Court cases with great sensitivity to the legitimate activities of affiliated corporations. Petitioners have therefore been unable to cite a single case in which application of the doctrine has led to a perverse result; nor is there any evidence to suggest that the Court's decisions have discouraged the creation of subsidiary corporations or inhibited business efficiency. Since liability may be imposed only in those narrow circumstances involving concerted predatory conduct, formation of subsidiaries for legitimate business purposes is not discouraged.

III.

Petitioners and *amici* have requested the Court to create a new rule of law under which any number of separate corpo-

rations affiliated through majority stock ownership would nevertheless always be held to constitute a single legal person, incapable of violating Section 1 of the Sherman Act. The creation of such a rule would ignore the substance of the relationship between the corporations and the anticompetitive effects of their activities and would produce random results dictated by varying levels of stock ownership rather than by Sherman Act objectives. Petitioners' proposal would also conflict with the principles established under other antitrust provisions. Under Section 2 of the Sherman Act, Section 8 of the Clayton Act and other antitrust statutes, the courts have examined the actual relationship of affiliated corporations and their activities rather than considering only the level of stock ownership.

The exemption of affiliated corporations from Section 1 would leave victims injured by anticompetitive activities of such corporations without an antitrust remedy. Contrary to petitioners' assertion, predatory practices of affiliated corporations are not adequately addressed under Section 2 of the Sherman Act or other laws. For this reason, the *Attorney General's Report* concluded that Section 1 should be applied to coercive conduct of a parent and subsidiary "though short of an attempt to monopolize." (*Id.* at 35)

IV.

This Court has repeatedly held that the doctrine of *stare decisis* remains a foundation stone of jurisprudence. Here, the petitioners request that the Court ignore that doctrine and overrule a long line of its decisions which were based upon the Court's interpretation of the Sherman Act in light of its legislative objectives. Petitioners thus seek a reconsideration and reversal of fundamental antitrust law and policy as established by Congress. The Court has always held that such reassessments of competing economic and public policy considerations could be made only by Congress.

ARGUMENT

I. THE DECISIONS OF THIS COURT APPLYING THE SHERMAN ACT TO AFFILIATED CORPORATIONS ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND STATUTORY OBJECTIVES OF THE ACT.

Throughout the 93-year history of the Sherman Act, the Court has been presented time and again with the issue of whether affiliated corporations which have engaged in concerted anticompetitive action formed a "combination" or "conspiracy" within the meaning of the Sherman Act. The Court has consistently held that where such anticompetitive trade restraints have occurred, it is not a defense that the perpetrators were parent and subsidiary or commonly-owned corporations. Petitioners and *amici* attack those decisions and request that they be overruled. Those decisions, however, are in accord with the legislative history and objectives of the Sherman Act.

A. The Statutory Language and Legislative History Establish that Affiliated Corporations are Capable of Combining and Conspiring Under The Sherman Act.

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." (15 U.S.C. § 1) The statute is broad and unequivocal in its coverage. It prohibits "every" form of concerted activity that has the requisite trade restraining effect and makes no exception for affiliated businesses.

There is no doubt that parent and subsidiary corporations are separate legal entities, and as such provide the plurality of actors necessary to meet the literal statutory requirement. The United States concedes as much. (U.S. Br. 13) Moreover, petitioners and the United States do not dispute the proposition that whether affiliated corporations are capable of engaging in a combination or conspiracy should turn upon a consideration of the objectives of the statute. They assert, however, that those

objectives are *never* achieved by holding that such corporations may constitute a combination or conspiracy. Respondent submits that where affiliated but autonomously operated corporations combine their economic leverage to prevent the emergence of new competition to the detriment of consumers, fundamental Sherman Act objectives are infringed, and such business entities should not be excused from the prohibitions of the Act.[4]

This Court has observed that the "Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958). *See also* 21 Cong. Rec. 2461 (1890) (statement of Sen. Sherman).[5] Section 1 of the statute was intended to preserve competition by proscribing two types of practices prohibited by common law: (1) arrangements that eliminate or restrict competition between business units which would otherwise compete with one another; and (2) concerted actions that coercively restrict the competitive opportunity or commercial freedom of others. *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 59 (1911); Weston, *The Application of the Sherman Act to "Integrated" and "Loose" Industrial Combinations*, 7 Law & Contemp. Prob. 42, 51 (1940). Petitioners, the United States and other *amici* choose to focus on the first of these objectives while they largely ignore the second. (Pet. Br. 21-22; U.S. Br. 10, 14-16; Kaiser Br. 18)

This case, however, does not involve collusive practices among competitors. It involves the second Sherman Act

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[4] Petitioners and the United States do concede that corporations related by stock ownership are capable of engaging in a combination where the level of stock ownership is 50% or under, but they would create an absolute exemption for all corporations whose ownership exceeds that level. (Pet. Br. 42 n.33; U.S. Br. 21 n.31)

[5] Except as otherwise noted, all citations to the legislative history of the Sherman Act can be found in E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 113-28, 158-59, 177, 182, 284, 292-94, 300-02 (1978). Except as otherwise indicated, all references to Sherman Act debates concern the concepts embodied in Section 1.

objective, the preservation of competitive opportunity. Here, the petitioners combined their economic power for the purpose of establishing a supplier boycott of a new competitor, resulting in diminished product supply and the frustration of price competition. Such conduct clearly poses a significant threat to competition and cannot in any way be characterized as pro-competitive or even neutral activity.

This Court has always held that the protection of competitive opportunity from such predatory efforts is an important Sherman Act objective. Thus, the Court has consistently prohibited joint exclusionary activities because "[m]onopoly can as surely thrive by the elimination of . . . small businessmen, one at a time, as it can by driving them out in large groups." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). As the Court stated more recently, "the freedom guaranteed each and every business, no matter how small, is the freedom to compete. . . ." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). *See also United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). These principles derive from the basic common law values which Senator Sherman sought to protect: "[i]t is the right of every man to work, labor, and produce in any lawful vocation. . . . This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* 21 Cong. Rec. 3147 (1890) (statement of Sen. George).[6]

Thus, one of the important legislative concerns of Section 1 was preservation of the opportunity for *new* " decision makers"

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[6] Senator Sherman further stated:

> I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; *but when they combine with the purpose to prevent competition, so that if a humble man starts a business in opposition to them . . . they will crowd him down . . . then it is the duty of the courts to intervene* . . . . (21 Cong. Rec. 2569 (1890) (emphasis added))

Amicus Kaiser Aluminum quoted the first phrase, but deleted the emphasized language. (Kaiser Br. 18)

to enter the market free of predatory restraints imposed by others. In describing this objective as one drawn from the common law, Justice Holmes stated:

> Combinations or conspiracies in restraint of trade . . . were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. (*Northern Securities Co.* v. *United States,* 193 U.S. 197, 404 (Holmes, J., dissenting))

Congress intended that the Sherman Act have the widest application to prohibit such restraints in whatever form imposed, including combinations of affiliated corporations. *Standard Oil, supra,* 221 U.S. at 59-60. The term "combination" in particular was an all embracing term in its contemporary usage as well as in its common-law meaning, referring to any "combination of labor and capital."[7] Senator Sherman stated that even a partnership or corporation "is a combination" which, when used to restrain trade, "is aimed at by this bill." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* Marowitz, *The Antitrust Act and the Merger Case,* 17 Harv. L. Rev. 533, 534-35 (1904). The commercial trusts of the day were simply regarded as "a new form of combination." 21 Cong. Rec. 2457 (1890) (statement of Sen. Sherman). *See also* H. Thorelli, *The Federal Antitrust Policy* 84-85 (1955) ("the 'trust problem' in contemporary debate [arose] . . . from the existence of all kinds of combinations, from the simple agreements and pools to the holding companies (as far as they

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[7] This Court has attributed a broader sweep to the term "combination" than to the term "conspiracy." *See, e.g., Albrecht* v. *Herald Co.,* 390 U.S. 145, 149 (1968); *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 44 (1960).

had come into existence) and mergers."). The common-law concept of "conspiracy" adopted by the statute had a similarly expansive application.[8]

Senator Sherman described this intentionally broad statutory sweep in terms of the common-law cases:

> . . . whether . . . combinations are by individuals, partnerships, or corporations, when the purpose of the combination or its plain tendency is to prevent competition, the courts have enforced the rule of the common law and have vigorously used the judicial power in subverting them. (21 Cong. Rec. 2459 (1890))[9]

Thus, in light of the Act's legislative history, one antitrust scholar concluded that Congress intended the Act "to be flexible" so as to preclude "[r]estrainers of trade" from finding "subterfuge behind new forms of combinations or methods. What mattered was whether trade *was restrained.*" H. Thorelli, *supra,* at 229 (1955) (emphasis in original).

Multi-corporate enterprises were known and feared by the framers of the Sherman Act, and it is clear that they viewed separately incorporated but affiliated corporations as subject to the combination provision of the statute.[10] The phrase "in the

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[8] Indeed, the United States has filed antitrust actions alleging a conspiracy between a corporation and its officers, contending "that there is no reason of language why the Sherman Act should receive an interpretation different from that which has been given to other conspiracy statutes." *United States* v. *Lorain Journal Co.*, 92 F. Supp. 794, 800 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951). *See generally* Kramer, *Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?*, 11 Fed. Bar J. 130 (1951).

[9] At least one of the cases cited by Senator Sherman involved parent-subsidiary exclusionary conduct. *See People ex. rel. Peabody* v. *Chicago Gas Trust Co.*, 130 Ill. 268, 22 N.E. 798 (1889), *cited at* 21 Cong. Rec. 2459 (1890) (statement of Sen. Sherman).

[10] Contrary to the contention of *amicus* Kaiser, affiliated corporations did exist at that time. (Kaiser Br. 18) Indeed, as early as 1887 at least one commentator called for complete prohibition of stock ownership by corporations. Stimson, *Trusts*, 1 Harv. L. Rev. 132, 148 (1887).

form of trust *or otherwise*" following the word "combination" was added during final Committee revisions to clearly indicate that the term combination was not to be limited to the trust device. Senate Judiciary Committee, 51st Cong., 1st Sess., Minutes 227 (1890) (available in National Archives, Washington, D.C.). *See also Northern Securities, supra,* 193 U.S. at 327 ("This combination is, within the meaning of the act, a 'trust,' but if not, it is a combination. . . .")

Senators Teller and Sherman both alluded to the potential danger of anticompetitive schemes perpetrated by separate but commonly-owned corporations. 21 Cong. Rec. 2562, 2569 (1890) (statements of Sens. Sherman, Teller).[11] In summarizing the legislative history, Judge Bork indicated that the term "combination" refers to "common ownership and control." Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J.L. & Econ. 7, 22 (1966).

Senator Teller specifically indicated that affiliated corporations were each considered distinct persons when he stated, with respect to the Standard Oil Trust, that "[e]ach corporation is a creature by itself." 21 Cong. Rec. 2571 (1890) (statement of Sen. Teller). *See also* 21 Cong. Rec. 2457-60 (1890) (statement of Sen. Sherman). Section 8 of the Act was thus added by the Senate Judiciary Committee to make it clear that "the term 'persons' was intended to apply to corporations."[12] E. Kintner, *The Legislative History of the Antitrust Laws and Related Statutes* 23 n.1.150 (1978).

Petitioners and the United States totally disregard the legislative history and the common law foundations of the Sherman Act. They rely solely upon the novel notion that Congress intended to create a "dichotomy" between Sections 1 and 2 of the Sherman Act, thereby allowing anticompetitive practices of affiliated corporations to substantially escape Sher-

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[11] *See also* E. Kintner, *supra,* at 10; H. Thorelli, *The Federal Antitrust Policy* 78-79 (1955) (Thorelli discusses the Cordage Trust, formed in 1887, which established a "joint subsidiary.")

[12] Section 8 provides that "[t]he word 'person' . . . shall be deemed to include corporations. . . ." (15 U.S.C. § 7)

man Act coverage. Thus, they argue that multi-party behavior is treated under the "strict" standard of Section 1, while unilateral behavior is covered by the more "lenient" standard of Section 2. (Pet. Br. 21; U.S. Br. 8-12) The conduct of affiliated corporations, they contend, should always be considered unilateral and therefore subject to the more lenient standard. This latter day artificial construct begs the basic question of whether the joint actions of affiliated corporations are within Section 1 by reason of the statutory language, legislative intent and the applicable decisions. Moreover, petitioners' argument is not supported by the "statutory scheme" of the Sherman Act.

As the Court pointed out in *Standard Oil, supra,* 221 U.S. at 60, Section 2 "was intended to supplement the first [section] to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded." Indeed, Section 2 was added to the basic statute by the Senate Judiciary Committee and was adopted with little debate. 21 Cong. Rec. 3151-53, 4090 (1890). *See generally* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890,* 23 U. Chi. L. Rev. 221 (1956). Congress thus intended to create no "dichotomy;" the prohibition was upon a continuum of practices, beginning with trade restraints which tend toward monopoly and progressing to the unlawful achievement of monopoly. *Northern Securities Co., supra,* 193 U.S. at 404-05 (Holmes, J., dissenting).

Furthermore, the language of both Sections 1 and 2 refers to combinations and conspiracies. Section 2 provides that it is unlawful for any "person" to monopolize, attempt to monopolize or "combine or conspire to . . . monopolize." (15 U.S.C. § 2) While Section 2 is concerned in part with individual monopolistic conduct, it is not so limited. Therefore, the issue concerning the status of affiliated corporations arises under both Section 1 and Section 2. *See, e.g., Brager & Company, Inc.* v. *Leumi Securities Corp.,* 429 F. Supp. 1341, 1346 (S.D.N.Y.

1977), *aff'd*, 646 F.2d 559 (2d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981). In fact, the Court has held that the standards for establishing a combination are identical under both sections. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10 (1946). Thus, the "statutory scheme" constructed by the petitioners and the United States is at odds with both the language and legislative history of the Act.

This Court has long held that the Sherman Act must be interpreted "in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 (1940). That legislative history, which petitioners ignore, demonstrates that the Fifty-first Congress clearly intended Section 1 of the Act to have the broadest application, with its focus on the anticompetitive effects of given practices regardless of whether the persons engaging in them are affiliated corporations. This Court has always so held.

B. The Decisions of this Court Unequivocally Hold that Affiliated Corporations are Capable of Combining and Conspiring Under the Sherman Act.

In the first Sherman Act cases to reach this Court, the Court held that affiliated corporations can constitute a "combination" within the meaning of the Act. Thus, in *Standard Oil, supra*, the Court concluded that the Standard Oil holding company and its subsidiary corporations were a "combination" under Section 1 and that the activities in which they together engaged after their affiliation constituted unreasonable trade restraints. (221 U.S. at 74)[13] *See also Northern Securities,*

[13] The defendants in *Standard Oil* argued, as do petitioners here, that "[b]ecause of the common ownership . . . they were not independent or competitive but they were the constituent elements of a single business organism." (221 U.S. at 8) *See also* 221 U.S. at 4, 5, 14. The Court adopted the government's view that, "[t]he inhibition against the suppression of competition by any instrumentality . . . applies to all corporations and all devices. The real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained. . . ." (221 U.S. at 23)

supra, 193 U.S. at 327. *Standard Oil* was followed by *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911), in which the defendant and five of its "accessory corporations" were charged with conspiracy. The Court held that American Tobacco and its subsidiary corporations violated Section 1, stating: "[T]he combination as a whole, involving all its cooperating or associated parts, *in whatever form clothed*, constitutes a restraint of trade within the first section. . . ." (*Id.* at 184 (emphasis added)) In *United States* v. *United States Steel Corp.*, 251 U.S. 417, 454-57 (1920), this Court made it clear that its holdings in *Standard Oil* and *American Tobacco* were based on the predatory acts of the affiliated corporations and not the mere fact of affiliation. *See also United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 376-77 (1933).

In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), however, the Court was asked to create an exemption from Sherman Act coverage for parent and subsidiary corporations. There, the United States charged that a group of affiliated corporations excluded competing taxi cab manufacturers from access to the market by agreeing to purchase only from a manufacturing affiliate. The government argued that the subsidiary corporations were separate economic units and not merely *alter egos* of the parent and that "100% stock ownership in a subsidiary does not negative the possibility that the parent and the subsidiary have entered into an unlawful conspiracy in restraint of trade." (Brief for the United States at 40, *United States* v. *Yellow Cab Co.*, *supra*) In refusing to create an exemption for affiliated corporations, the Court stated:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any

> affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360-361, 376-377.
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> And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. (332 U.S. at 227)

Thus, the Court's interpretation of the conspiracy language of Section 1 gave meaning to the ultimate objective of the statute, the prevention of unreasonable restraints on competitive freedom, particularly where the activities excluded third parties.[14]

Yellow Cab was followed by *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948), in which a parent and its wholly-owned subsidiary corporations were charged with engaging in practices designed to destroy or exclude competitors. Defendants argued there, as petitioners do here, that:

> wholly-owned subsidiary companies, while they may serve to insulate the parent company from liability . . . can hardly be regarded from the standpoint of the Sherman Act as having separate and independent wills, so that their coming together with the parent company in a common purpose can create a conspiracy. (Brief for Appellants at 71, *Schine Chain Theatres, Inc.* v. *United States, supra*)

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[14] Petitioners and *amici* attempt to explain away *Yellow Cab* by suggesting that corporate acquisitions rather than post-acquisition behavior formed the basis of the Court's decision. (Pet. Br. 27; U.S. Br. 18) Such an interpretation of *Yellow Cab,* however, was specifically rejected by the Court in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 522 (1948) (emphasis added): "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, *not that corporate integration violated the act.*"

The Court rejected this argument and adopted the government's request to reaffirm its holding in *Yellow Cab*, stating that the members of the combination were "not immunized by reason of" their affiliation. (334 U.S. at 116)

In *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court reaffirmed this principle once again. *Kiefer-Stewart* involved the coordinated activities of corporate subsidiaries to boycott a dealer for the purpose of controlling retail price levels. The United States filed a brief as *amicus curiae* urging the Court to hold that respondents had engaged in a price fixing conspiracy in violation of Section 1 of the Sherman Act. The Court, in so holding, stated:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E.g., United States* v. *Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors. (340 U.S. at 215)

Petitioners attempt to distinguish the *Kiefer-Stewart* opinion by asserting that the Court *might* have found other grounds to decide the case, *i.e.*, the existence of a conspiracy between defendants and plaintiff. (Pet. Br. 28) The fact is that the case was not decided on other grounds.[15]

The government again challenged activities of affiliated corporations in *Timken Roller Bearing Co.* v. *United States*,

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[15] Petitioners' attempt to distinguish the opinion fails on two counts: first, there was no evidence in *Kiefer-Stewart* that plaintiff had agreed to maintain prices; and second, the proposition that a plaintiff could conspire with a defendant did not develop until *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), almost ten years later.

341 U.S. 593 (1951), wherein defendants were charged with concerted behavior designed to eliminate all competition among themselves and with competing firms. The defendants argued there, as petitioners do here, that the corporations involved constituted a single enterprise incapable of conspiring under the Sherman Act. In urging the Court to reaffirm the application of the Sherman Act to such affiliated corporations, the government pointed out in oral argument:

> While courts sometimes look beyond corporate entities, they do so when it will serve the public interest, not when it will serve the interest of particular individuals. (19 U.S.L.W. 3293 (May 1, 1951))

In finding for the government, the Court reiterated that "common ownership or control . . . does not liberate [corporations] from the impact of the antitrust laws." (341 U.S. at 598) Petitioners rely upon the dissents in *Timken* as postulating the proper approach. Those dissents, however, were concerned solely with foreign commerce and provide no support for the notion that affiliated corporations lack the capacity to conspire.[16]

The foregoing decisions have consistently been read to apply only to trade restraints aimed at suppressing the competition of parties not within the affiliated group. They do not represent an invasion of the normal business relationships between affiliated corporations. Thus, *The Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) (hereafter "*Attorney General's Report*") stated:

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[16] Justice Frankfurter specifically stated that "the circumstances of foreign trade may alter the incidence of what in the setting of domestic commerce would be a clear case of unreasonable restraint of trade." (341 U.S. at 605) Justice Jackson added: "It is one thing for competitors or a parent and its subsidiaries to divide the United States domestic market" and quite another when such conduct involves foreign markets. (*Id.* at 608)

> Neither *Kiefer-Stewart* nor *Timken* hold that restraint of trade of one's subsidiaries by agreement with or between the subsidiaries is illegal in the absence of a purpose and effect to restrain the trade of others not members of the corporate family. (*Attorney General's Report, supra,* at 34)

The *Attorney General's Report* described the essence of the Court's decisions as follows:

> The substance of the Supreme Court decisions is that concerted action between parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated. (*Attorney General's Report, supra,* at 34)

See also ABA Monograph, *Antitrust Law Developments* 33 (1975). The *Attorney General's Report* specifically concluded that Section 1 may be transgressed where, as here, "a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor. . . ." (*Id.* at 35)[17]

Thus, the concern expressed by petitioners and *amici* that the Court's decisions stand for the proposition that related

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[17] The Attorney General's Committee consisted of lawyers, law professors, and economists who were "specialists in the antitrust or cognate fields." *Attorney General's Report, supra,* at iv. The Assistant Attorney General, Antitrust Division, Stanley N. Barnes, was Co-Chairman and the Chairman of the Federal Trade Commission was a member of the Committee. Since its publication, this Court has frequently relied on the *Attorney General's Report's* analysis of the antitrust laws. *See, e.g., Falls City Industries, Inc.* v. *Vanco Beverage, Inc.,* 103 S. Ct. 1282, 1294-95 (1983); *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 439-40 (1978); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 690-92 (1978); *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 176 (1964).

corporations may not lawfully coordinate their organizational or marketing activities is unfounded. Indeed, the subsequent decisions of this Court further reinforce the conclusions of the *Attorney General's Report*. *See, e.g., Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*"); *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975); *United States Steel Corp.* v. *Fortner Enterprises*, 429 U.S. 610 (1977) ("*Fortner II*").

In *Sunkist, supra*, the Court was presented with a question of interpretation of the Capper-Volstead agricultural exemption from the antitrust laws. (15 U.S.C. § 17) Although the Court had no occasion specifically to discuss the combination or conspiracy language of the Sherman Act or to cite its earlier decisions on the subject, it noted the importance of the operational realities of the separate corporations:

> There is no indication that the use of separate corporations had significance in itself or that outsiders considered and dealt with the three entities as independent organizations. (370 U.S. at 29)

The Court concluded that Congress intended to exempt such arrangements where the parties had "banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." (*Id.* at 29) Of course, there is no similar statutory exemption here which would protect the activities of petitioners to intentionally suppress competition, although they now request the Court to judicially create such an exemption.

In *Perma Life, supra*, the Court reaffirmed that no such judicial exemption is permissible. There, the lower court had dismissed a complaint alleging a conspiracy among commonly-owned corporations. In remanding for trial, the Court reiterated the fact that common ownership does not remove the

legal ability of separate corporations to combine or relieve them of the "obligations that the law imposes on separate entities." (392 U.S. at 141-42)[18]

In *Fortner I, supra,* the plaintiff charged an agreement between a parent and a wholly-owned subsidiary corporation to impose a tying arrangement on customers. Citing its previous parent-subsidiary decisions, the Court held that a violation could be found where "credit is provided by one corporation on condition that a product be purchased from a separate corporation. . . ." (394 U.S. at 507) *See also Fortner II, supra,* 429 U.S. at 623 (Burger, C.J. and Rehnquist, J., concurring).

In *Citizens & Southern, supra,* the United States filed an action alleging price fixing and challenging certain correspondent relationships between a bank and partially owned *de facto* branches which it had established. The Court reaffirmed that corporate "interrelationships . . . are not determinative of the applicability of the Sherman Act." (422 U.S. at 116, *citing, Yellow Cab, supra*) The Court went on to consider the nature and extent of the corporate relationships and activities, and concluded that the purpose and effect of the challenged arrangements were to promote competition rather than to defeat it, and therefore the arrangements did not infringe Section 1 of the Sherman Act. (422 U.S. at 118-20)

Thus, throughout the history of Sherman Act enforcement, the Court's framework for analysis has been consistent and rational. Where the purpose or effect of concerted conduct is the suppression of competition, the Court has concluded that corporate affiliation is no defense; where the conduct involves only internal management activities, the Court has found that antitrust concerns are not implicated. Such an analysis gives

[18] Petitioners suggest that the main opinion in *Perma Life* represented the view of only four members of the Court. (Pet. Br. 31) That is clearly incorrect. The concurring opinions as well as the partial dissents all adopted the main opinion on the parent-subsidiary question, but expressed differing views on the *in pari delicto* issue.

meaning to the congressional objective of the Sherman Act to preserve competition, yet at the same time insures the freedom of businesses to organize in any way which they deem appropriate.

These decisions are not fraught with "grave deficiencies," nor can they be explained on other grounds as now suggested by petitioners. (Pet. Br. 32, 25) In fact, petitioners recognized these inescapable holdings when they tendered their jury instruction in the district court which stated in no uncertain terms that "a corporation may be legally capable of conspiring with its wholly owned subsidiary." (Defts. Revised Instruction No. 26)[19]

C. The Government Antitrust Enforcement Agencies have Consistently Interpreted Section 1 as Applying to Affiliated Corporations.

Since adoption of the Sherman Act, the United States has repeatedly initiated enforcement actions against affiliated corporations under Section 1. In this Court alone, the government has successfully argued for the application of Section 1 to the joint conduct of affiliated corporations in at least ten cases over an 80 year period, either as a plaintiff or as *amicus*.[20]

In addition to its prosecution activities, the Antitrust Division of the Justice Department has consistently made enforce-

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[19] The instruction as tendered by petitioners was given by Judge Will to the jury in slightly modified form. Consequently, petitioners' briefs in the trial court and the Court of Appeals did not question the capacity of affiliated corporations to combine under Section 1. *See United States* v. *Ortiz*, 422 U.S. 891, 898 (1975). *See also Bowen* v. *United States Postal Service*, 103 S. Ct. 588, 599 n.19 (1983); Fed. R. Civ. P. 51 (error may not be assigned to instruction where no objection was made).

[20] The government has continued to file cases against parent and subsidiary conspiracies under Section 1 in recent years. *See e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *United States* v. *Cambridge-Lee Industries Inc.*, Cr. No. 83-00107 (E.D. Pa. filed March 18, 1983); *United States* v. *Central State Bank*, 564 F. Supp. 1478 (W.D. Mich. 1983).

ment policy statements supporting the application of Section 1 to affiliated corporations. For example, in 1967 in connection with the filing of *United States* v. *General Tire & Rubber Co.*, Civil No. 67-155 (N.D. Ohio filed March 2, 1967), alleging a parent-subsidiary combination, Assistant Attorney General Donald F. Turner stated:

> [A]s the law has developed in this area it has been thought appropriate to apply the conspiracy concept to the activities of a group of closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders. (Interview with Donald F. Turner, Assistant Attorney General, Antitrust Division, 34 Antitrust L.J. 113, 123 (1967))

Similarly, in 1971, Assistant Attorney General (later Judge) Richard W. McLaren set forth the Antitrust Division's enforcement policy of challenging practices of commonly-controlled firms "where the practice has a coercive or restrictive effect on outsiders." He further stated:

> [W]e have limited our use of the intraenterprise doctrine to situations in which the commonly-controlled firms *have pooled their power in a manner which has adverse competitive effects on independent business entities.* See *United States* v. *General Tire Co.*, et al., D.C.N.D. Ohio, Civil Action No. C-67-155. Such an application of the doctrine is consistent with the facts of the leading Supreme Court decisions. Such an approach is also consistent with the analysis of the case law made by the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955) p. 34.[21]

The Antitrust Division's position was reiterated almost verbatim in 1972 by Donald I. Baker (now petitioners' counsel), who was then Director of Policy Planning and later Assistant

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[21] Letter from Richard W. McLaren, Assistant Attorney General, Antitrust Division, to Board of Governors of the Federal Reserve System, *reprinted in* 1983 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 50,122, 55,197 (Feb. 22, 1971) (emphasis added).

Attorney General in charge of the Antitrust Division.[22] The Justice Department's *Antitrust Guide for International Operations,* adopted in 1977, again reaffirmed the Department's long established view that the Sherman Act applies to "coercive attempts by members of a corporate group to drive third parties out of business or out of markets." United States Department of Justice, *Antitrust Guide for International Operations* 12 n.26 (1977). The Antitrust Division's most recent statement in support of this position was made to this Court just last term when it cited *Yellow Cab* with approval and stated, "the key factor is the 'extent of control exercised by the parent over the subsidiary's business.'" (Brief of the United States at 46, *BankAmerica Corp.* v. *United States,* 103 S. Ct. 2266 (1983))[23]

The government's *amicus* brief filed in this case represents the first time since the passage of the Sherman Act that it has argued that Section 1 should be held inapplicable to the joint conduct of affiliated corporations. The government neither explains nor attempts to reconcile its previous position. Nor does the government suggest that there are any new empirical data or other information which might give rise to this turnabout. All of the arguments which the government now presses upon the Court were urged in opposition to the government's position in previous cases and were rejected by the Court.

This Court recently refused to adopt the government's similarly revisionist view of the Clayton Act in the face of its

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[22] "The 'Affiliation' Problem in Banking," Speech by Donald I. Baker to the Federal Bar Association (September 14, 1972).

[23] It is also noteworthy that the present Assistant Attorney General, Antitrust Division, recently urged Congress to treat a parent as separate from its subsidiary under the Bank Holding Company Act (12 U.S.C. § 1841, *et. seq*), "[g]iven that the holding company is *distinct* from the banking subsidiary. . . ." (Testimony of William F. Baxter, Assistant Attorney General, Antitrust Division, Concerning Competition in the Financial Services Industry, Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, June 8, 1983 at 12 (emphasis added))

contrary position over a 60 year period. *BankAmerica Corp.* v. *United States*, 103 S. Ct. 2266, 2271 (1983). As the Court noted in *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), "for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." Not only is the government's current position contrary to congressional intent, its consistent prior position "belies its present assertion." *Id.* Indeed, it is the Antitrust Division's consistent interpretation of Section 1 since the Act's adoption as applying to affiliated corporations which should be accorded "great weight." *BankAmerica Corp., supra*, 103 S. Ct. at 2271. *See also General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-43 (1976).

II. THE PRINCIPLES ESTABLISHED BY THE DECISIONS OF THIS COURT CONSTITUTE LOGICALLY SOUND AND WORKABLE ANTITRUST POLICY.

A. The Principles Are Rational and Workable in Their Application.

In applying the principles established by the decisions of this Court, the lower courts have examined the relationship between affiliated corporations to determine: (1) whether the affiliated corporations function as distinct economic units, and (2) whether each corporation acting in concert engaged in activities designed to unreasonably restrain the trade of third parties.

Contrary to the contentions of the petitioners and *amici*, neither this Court nor lower courts have held that Section 1 liability turns solely upon the fact of separate incorporation. Indeed, such an analysis has been consistently rejected, particularly in light of this Court's holding in *Yellow Cab* that "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." (332 U.S. at 227) This Court and the lower courts have also rejected the formalistic rule proposed by petitioners that the mere fact of

affiliation should insulate the companies from Section 1 liability. As the court stated in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir.), *cert. denied*, 103 S. Ct. 57 (1982) (citations omitted):

> just as the fact of common ownership alone should not insulate corporations from the antitrust laws, this court has held that "the mere formality of separate incorporation is not, without more, sufficent to provide the capability for conspiracy."

Thus, the separate legal status of the parties is the beginning, not the end, of the inquiry. Separate persons are capable of combining only when they are also functionally separate and where holding them capable of combining would be consonant with the underlying purposes of the Act. Moreover, a finding of capacity to combine is not the equivalent of finding a Sherman Act violation, a point which petitioners and *amici* seem consistently to ignore. It must also be established that each of the participants undertook activities which ultimately resulted in a demonstrably adverse effect on competition.

1. The relationship of the affiliated corporations

An examination of the relationship between the affiliated firms is undertaken "to determine whether the corporations have 'antitrust significance as separate economic units.'" *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, *supra*, 668 F.2d at 1054. As the Court of Appeals stated in this case, the focus is "on the practical relationship between the parent and the subsidiary" to determine whether "there is enough separation between the two entities to make treating them as two independent actors sensible." (691 F.2d at 318; Cert. App. A-11) Other courts have set forth these principles in similar terms. *See, e.g., Knutson* v. *Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980).

The Court of Appeals here noted that the test developed by the courts "seeks the answer to the question [of separateness] in terms of evidence that is empirical, readily furnished, and amenable to development at trial. . . ." (691 F.2d at 318; Cert. App. A-12) This analysis requires consideration of a variety of specific factors designed to ascertain the functional separateness of the corporations in actual operation. *See Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); L. Sullivan, *Law of Antitrust* 326-28 (1977).[24]

Here, the facts established that Copperweld and Regal constituted separate economic operating units. As the Court of Appeals noted, the District Court's charge "emphasized to the jury that they were looking for real, rather than merely formal, distinctness . . . ." (691 F.2d at 319; Cert. App. A-13) The jury was clearly instructed that Copperweld and Regal were not capable of combining or conspiring if "they are operated in such a way as to, in effect, constitute just one company." (*Id.*) After listing the factors to be considered, the District Court instructed the jury that:

> If you find from the evidence that Regal Tube Company is not sufficiently distinct from Copperweld *as an economic*

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[24] It may not be necessary in every case to examine all of the factors to find a lack of capacity to conspire. For example, where a single person owns and operates both corporations it is evident that the corporations are not separate. *See, e.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd on other grounds*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979). Petitioners seek to force themselves into the alien mold of the "sole decisionmaker," but they were operated as separate businesses by separate managements, and the Court of Appeals so concluded. (691 F.2d at 320; Cert. App. A-16-17)

> *entity,* then you must consider them as a single person. (691 F.2d at 319; Cert. App. A-14 (emphasis added))[25]

The Court of Appeals noted that the evidence supported the finding that "Regal management had real autonomy in both day-to-day and policy decisions. . . ." and that Regal was a separate actor in the scheme to eliminate Independence. (691 F.2d at 320-21; Cert. App. A-16-18)[26]

Without citation to any legal or economic authority, the government and petitioners argue that affiliated corporations cannot be viewed as independent in "an economic or antitrust sense." (U.S. Br. 15; Pet. Br. 22) However, where a subsidiary corporation is operated with substantial autonomy, it is, in a very real sense, a separate "economic unit." Even the government now concedes, as it must, that economists use the term "economic unit" to refer to subunits of a single firm which have sufficient resources and autonomy of operation. (U.S. Br. 8 n.7)[27] It is sensible to consider such entities separate economic

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[25] Petitioners claim here, as they did below, that the District Court changed the factors to be considered regarding separateness of operation. As the Court of Appeals noted, this contention exhibits "confusion about how a balancing test works." (691 F.2d at 319; Cert App. A-14) In an appendix to its opinion the Court of Appeals juxtaposed the District Court's instruction and the relevant portions of its opinion in *Photovest* and found them to be consistent. (691 F.2d at 318-19, 331-32; Cert. App. A-13, 14, 40-42)

[26] Petitioners also complain that the jury was not instructed to consider that Copperweld and Regal did not hold themselves out as competitors. (Pet. Br. 36) That factor, however, was irrelevant in this case because there was no assertion that there was a horizontal combination of affiliated competitors.

[27] *See, e.g.,* R. Rumelt, *Strategy, Structure and Economic Performance* 33 (1974) ("economic unit" defined as "a firm or subunit of a firm that has sufficient resources and autonomy to act on its own behalf in the market place.")

units because they are free to develop a network of contracts and other business relationships with customers, suppliers, financing sources and others which create an economic impact; in economic terms, they serve as a "nexus for contracting relationships."[28] Those relationships are necessary to conduct a business, but they can also be used to help achieve anti-competitive objectives. Thus, when the economic leverage of the business relationships of one such economic unit is combined with that of another economic unit to "strengthen an anticompetitive assault," a trade restraint can occur which is of serious antitrust concern. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., supra,* 668 F.2d at 1055.

The fact that a parent corporation would ultimately have the legal right to set in motion actions to remove the autonomy of a subsidiary through total integration does not diminish the anticompetitive injury which autonomous units have caused.[29]

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[28] Jensen and Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. Fin. Econ. 305, 311 (1976) ("The private corporation or firm is simply one form of *legal fiction which serves as a nexus for contracting relationships . . . .*") (emphasis in original). The government relies upon the definition of "enterprise" in J. Bain, *Industrial Organization* (1959), but fails to quote the following statement from Bain:

> [T]he corporation is endowed with "legal entity." It is an artificial person in the eyes of the law, separate from the persons of any shareholders, and as such can make contracts, incur debts, sue and be sued in the courts, and perform such other legally controlled commercial acts as a natural person might be entitled to do. It can do all of these things in its own name, without the direct participation of any or all of the shareholding owners. (*Id.* at 70)

[29] Similarly, the possibility that a parent might sometimes be able to direct an autonomous subsidiary to use its economic position to assist a parent in a predatory activity does not detract from the fact that it is the separate economic influence of the subsidiary derived

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The significant antitrust issue is whether the parent and subsidiary "firms have pooled their power in a manner which has adverse competitive effects on independent business entities." (Letter of Richard McLaren, Assistant Attorney General, Antitrust Division, *supra*, at 55,197)[30]

Copperweld acquired Regal as an ongoing business with its own customer and supplier relationships. Petitioners concede that Regal is engaged in a market separate from those in which Copperweld is involved. (Pet. Br. 4 n.3) The individual business relationships which Regal possessed and maintained through its autonomous operation in its separate market gave it economic influence. When that influence was combined with Copperweld's leverage with potential suppliers of Independence, substantial anticompetitive consequences resulted. As the Court of Appeals noted:

> Regal had a separate sales force and clientele (until the 1979 reorganization of Copperweld's subsidiaries) and made its own arrangements with suppliers of equipment and raw materials—a fact relevant to the ability of the

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from its business relationships which enhances the anticompetitive potential of the parent-subsidiary "combination." Such enhancement of the potential for success in achieving an unlawful objective is one of the evils at which conspiracy law is aimed. *See Callanan* v. *United States*, 364 U.S. 587, 593-94 (1961).

[30] Modern economic theory holds that ownership of corporate stock is not the equivalent of control in a realistic economic sense:

> [O]wnership of capital should not be confused with ownership of the firm. Each factor in a firm is owned by somebody. The firm is just a set of contracts covering the way inputs are joined to create outputs and the way receipts from outputs are shared among inputs. In this "nexus of contracts" perspective, ownership of the firm is an irrelevant concept. Dispelling the tenacious notion that a firm is owned by its security holders is important because it is a first step toward understanding that control over a firm's decisions is not necessarily the province of security holders. (Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ., 288, 290 (1980))

> defendants to bring pressure to bear on more people if they worked together than either could alone or than both could if Regal were a full-fledged division. (691 F.2d at 320; Cert. App. A-17 (citations omitted))

Thus, each company used the leverage of its relationships to put pressure on other firms not to deal with Independence. Regal had business relationships with mill manufacturers, real estate firms and steel suppliers. On the other hand, Copperweld had separate relationships with steel suppliers and banks. (PX 249, 431, 1100; T. 473-85, 496, 599-600, 1119-21, 1333-36, 1792-99, 2140-42, 2244-47, 2683-85, 4047-51) It was the aggregation of the power, which each company possessed individually and coordinated to influence other firms, that created the "combination" or "conspiracy" within the meaning of the Sherman Act.

2. The nature of the conduct involved

Even where it is determined that the affiliated corporations are separate economic units, courts have found no violation of Section 1 absent joint anticompetitive conduct directed at third parties. Indeed, it has only been in such relatively rare instances that a capacity to conspire has been found:

> Rarely have courts actually found affiliated corporations guilty of conspiring in violation of the Sherman Act, however, and then only in cases where, after a full trial, the facts established, either expressly or by necessary implication, that the corporations had acted without a legitimate business purpose and with anticompetitive intent. (*Chastain* v. *American Telephone & Telegraph Co.*, 401 F. Supp. 151, 160 (D.D.C. 1975) (footnote omitted))

See also General Business Systems v. *North American Philips Corp.*, 699 F.2d 965 (9th Cir. 1983); *Thomsen* v. *Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982) ("actions of affiliated corporations which touch only on internal operations and have no anti-competitive consequences cannot violate § 1"); *Reisner* v. *General Motors*

Corp., 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982); *Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 859 (N.D. Cal. 1979), *aff'd on other grounds*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

There can be no doubt that the purpose and effect of the petitioners' activities here were to restrain the trade of a third party, and the Court of Appeals explicitly so concluded. (691 F.2d at 317 n.5; Cert. App. A-9, 10 n.5)[31] Contrary to petitioners' suggestion, this activity went far beyond a unilateral interference with contract. Beginning at least as early as January 1973 and extending into 1976, Copperweld and Regal undertook to establish a broad boycott of Independence. The fact that the petitioners achieved their greatest success early in their scheme, when Yoder breached its contract with Independence, does not convert this overtly anticompetitive scheme into a simple interference with contract claim. Moreover, the evidence established that petitioners' campaign resulted not only in Yoder's cancellation of a contract, but it also affected Independence's relationship with other suppliers. (PX 562; T. 314, 2662-64, 2871-74) Thus, petitioners' concerted efforts were successful because they were able to coerce other firms to materially aid in achieving their anticompetitive aims.[32]

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[31] The District Court, in connection with the antitrust claim, specifically instructed the jury that they must determine whether petitioners' conduct "was motivated by an intent unlawfully to prevent Independence from entering the market. . . ." (T. 8481-86) Both the District Court and the Court of Appeals held that the evidence supported the jury's finding of predatory conduct. (691 F. 2d at 325; Cert. App. A-27; Cert. App. B-7)

[32] Petitioners represent that "[t]he jury thus found that identical conduct by petitioners was unilateral for purposes of the tort claim and conspiratorial for purposes of the Sherman Act claim." (Pet. Br. 7 n.7) The Court of Appeals rejected this very contention, noting the clear factual and legal differences between the tort and antitrust

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This Court has held that even where mere agents of a corporation "materially aided in the accomplishment" of an anticompetitive scheme, a "combination" exists. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 (1968); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Certainly, then, where autonomously operated corporations actively participate in an anticompetitive campaign, a combination also exists.[33]

B. The Decisions of This Court are Conceptually Sound and Logically Consistent with Other Areas of Law.

The decisions of this Court concerning affiliated corporations under Section 1 are consistent with the approach of this and other courts generally to the treatment of parent-subsidiary relationships. That approach, often characterized as "enterprise law" or "enterprise entity law," was first articulated by Professor A. A. Berle:

> [I]n a case in which one corporation owns a controlling stock interest in another it has [not] by that fact alone made a single enterprise out of two different ones. The controlling corporation has a choice. It can, if it chooses, elect to permit, or perhaps require, its subsidiary to manage its own affairs, make its own decisions, and operate as a separate enterprise, the parent retaining only an inves-

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claims. (691 F.2d at 321; Cert. App. A-18-19) In fact, the jury concluded that Regal was not vicariously liable for the tort of Copperweld, a separate corporation.

[33] Copperweld, itself, relied upon the parent-subsidiary combination doctrine to oppose a hostile takeover in *Copperweld Corp.* v. *Imetal*, 403 F. Supp. 579, 594 (W.D. Pa. 1975). In connection with related litigation, Judge Will stated:

> Although Copperweld does not say so, the real difference between its motive in *Imetal* and its motive in the present case is that in *Imetal* it was in Copperweld's best interest to establish that Copperweld and Regal operated independently of each other, whereas in the present case it was in Copperweld's best interest to endeavor to establish the opposite. (Cert. App. B-15-16)

> tor's interest. Or it can integrate the operations of the subsidiary with its own, in whole or in part, thereby bringing the two operations together into a single enterprise entity. There is no compulsion on it to adopt or refrain from either course; but the legal consequences vary with the choice. (Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343, 357 (1947))

Under this approach, the Court has held both in the antitrust area and in other areas that corporate entities "will not be summarily disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946); *see also Perma Life, supra*, 392 U.S. at 141-42.

In many other areas of the law, the basic analysis is similar to that in the antitrust field, that is, a determination is made of the extent to which affiliated firms actually operate as independent business units, and consideration is given to the objectives of the applicable statute or rule of law.[34] Such a

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[34] The issue arises in many areas of the law including: taxation, *F.W. Woolworth Co.* v. *Taxation and Revenue Dep't of New Mexico*, 102 S. Ct. 3128, 3134 (1982) (autonomous operation of parent and wholly-owned subsidiary prevented taxing the corporations as single enterprise); *In re Chrome Plate, Inc*, 614 F.2d 990, 996 (5th Cir.), *cert. denied*, 449 U.S. 842 (1980) (parent and wholly-owned subsidiary separate taxable entities despite filing consolidated tax returns); labor, *United Paperworks* v. *T.P. Property Corp.*, 583 F.2d 33 (1st Cir. 1978) (parent not bound by collective bargaining agreement between wholly-owned subsidiary and union); ownership of securities, *Engel* v. *Teleprompter Corp.*, 703 F.2d 127, 134 (5th Cir. 1983) (stock acquired by wholly-owned subsidiary is not that of the parent corporation); bankruptcy, *In re Gibraltor Amusements, Ltd.*, 291 F.2d 22 (2d Cir.), *cert. denied*, 368 U.S. 925 (1961) (parent and wholly-owned subsidiary are separate creditors under the Bankruptcy Act, 11 U.S.C. 1, *et seq.*); contract liability, *CM Corp.* v. *Oberer Development Co.*, 631 F.2d 536, 538 (7th Cir. 1980) (stock ownership, shared

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realistic analysis is essential to the "development of a workable and coherent body of law." P. Blumberg, *The Law of Corporate Groups* 25 (1983).

The United States, in its brief to this Court in *Citizens & Southern, supra,* cogently described these principles in relation to Section 1 of the Sherman Act:

> Although courts sometimes "pierce the corporate veil" by ignoring formal distinctions between a corporation and its shareholders, (*e.g.,* between a parent corporation and its wholly-owned subsidiary), that is almost invariably done in order to impose liability on entities other than the corporation that took challenged action. It is quite another matter, however, to ignore the separate corporate identities of independent firms and permit them to evade a liability on the claim that they are a single entity. See generally Berle, *The Theory of Enterprise Entity,* 47 Colum. L. Rev. 343 (1947).

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directors and other formal indicia of affiliation not sufficient to impose liability on parent for breach of subsidiary); jurisdiction and venue, *Hargrave* v. *Fibreboard Corp.,* 710 F.2d 1154, 1160 (5th Cir. 1983) (court must consider "[a]ll the relevant facts and circumstances surrounding the operations of the parent and subsidiary"); *Quarles* v. *Fuqua Industries, Inc.,* 504 F.2d 1358, 1364 (10th Cir. 1974) (a parent's "exercise of, not the opportunity to exercise, control is determinative"); service of process, *Stoehr* v. *American Honda Motor Co.,* 429 F. Supp. 763, 766 (D. Neb. 1977) (service on subsidiary is not service on parent even though 100% owned and common officers and directors because no exercise of control); indispensable parties under Rule 19 Fed. R. Civ. P., *Glenny* v. *American Metal Climax, Inc.,* 494 F.2d 651 (10th Cir. 1974) (wholly-owned subsidiary held to be an indispensable party in action brought against parent corporation); standing, *Alcan Aluminum Ltd.* v. *Franchise Tax Bd.,* 558 F. Supp. 624, 627 (S.D.N.Y. 1983) (parent corporation does not have standing to challenge wholly-owned subsidiary's tax liability); judgments, *Zenith Radio Corp.* v. *Hazeltine Research Inc.,* 395 U.S. 100, 108-12 (1969) (judgment against wholly-owned subsidiary does not bind parent); garnishment, *Dunn* v. *Printing Corp.,* 245 F. Supp. 875 (E.D. Pa. 1965) (property of wholly-owned subsidiary is not the property of parent subject to garnishment).

> To the contrary, as this Court has stated, "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432, 437. The statutes involved here are aimed at preserving competition, and "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 227. In determining whether, for purposes of that Act, corporations are independent entities or mere corporate shells or divisions of the same entity, *this Court has looked to the fundamental policies being vindicated as well as the indicia of corporate independence.* (Brief for the United States at 28-30, *United States* v. *Citizens & Southern National Bank, supra* (footnote omitted; emphasis added))

Petitioners and the government now assert that since some lower courts have held unincorporated divisions incapable of combination or conspiracy, this Court should rule that all affiliated corporations also lack such capacity.[35] The Court here is not presented with the issue of the legal status of unincorporated divisions; Copperweld and Regal were not only separate corporations, but they were operated as separate businesses. The indisputable fact is that there was a substantial trade restraint when these legally and functionally separate businesses prevailed upon others to refuse to deal with respondent. But, even if it were to be assumed that an unincorporated division could not, under any circumstance, engage in a Sherman Act

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[35] Petitioners rely upon two lower court decisions which held that corporations were incapable of combining with their unincorporated sales divisions because such divisions were *neither* separate functional *nor* separate legal entities. *H&B Equipment Co.* v. *International Harvester Co.,* 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). The court in *H&B* went on to find that a corporate subsidiary "marked . . . off as a distinct entity," was capable of conspiracy. (577 F.2d at 245)

combination because it was not a separate legal person, that assumption would not justify creation of an exemption for all incorporated subsidiaries, particularly since the legal incidents of separate incorporation take on economic significance. (*See* part II.A., *supra*)[36] Congress sought to interdict all unreasonable trade restraints resulting from any combination or conspiracy. Given the broad remedial purpose of the Act, it would be indeed perverse to restrict its intended coverage because the statute was not drafted or interpreted even more broadly to cover unincorporated divisions.[37] As stated by Professor Sullivan in his authoritative antitrust treatise:

> It is perfectly defensible when Congress has sought to cast a wide net to catch restraints of trade to conclude that any two legal persons can conspire. (L. Sullivan, *Law Of Antitrust* 327 (1977) (footnote omitted))[38]

Professor Sullivan goes on to point out that the next step in the analysis is to determine whether the concerted action is limited solely to internal management or "erects barriers to entry by another separate firm." (*Id.* at 328) This analysis is in accordance with the objectives of the statute and is in perfect harmony with the legal principles applied to parent-subsidiary relationships in other areas of the law.

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[36] In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 469 n.4 (1962), this Court specifically reserved ruling on the question of whether autonomously operated divisions "came within the rule as to corporate subsidiaries." However, the Court in *Poller* did hold that a combination between a corporation and its agents may violate Section 1.

[37] This Court has recently held that an incorporated subsidiary of a firm may be subject to certain legal obligations under federal statutes which do not apply to unincorporated branches. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 189 (1982).

[38] *See also* Barndt, *Two Trees or One?—The Problem of Intraenterprise Conspiracy*, 23 Mont. L. Rev. 150, 198 (1962).

C. The Principles Established by the Decisions of this Court do not Interfere with Efficient Organization and do not Lack Predictability.

This Court and the lower courts have analyzed allegations of parent-subsidiary combinations and conspiracies with great sensitivity to the legitimate activities of affiliated corporations. Indeed, former Assistant Attorney General Donald F. Turner observed that no court has found a violation where the sole purpose of the joint activities was to coordinate internal decisions; the doctrine has "always been applied to predatory or coercive conduct directed against outsiders." Interview with Donald F. Turner, *supra*, 34 Antitrust L.J. at 123.

Petitioners and *amici*, however, launch a broadside attack against these principles by posing hypothetical misapplications and theoretical conceptual difficulties that have no relationship to the case before the Court. Moreover, these objections bear little relation to reality:

1. *Amicus* Kaiser hypothesizes instances in which the application of Section 1 to the conduct of affiliated firms would be inappropriate, yet it is unable to cite a single case in which Section 1 liability has been found in such circumstances. (Kaiser Br. 11-12) Indeed, the courts have specifically declined to find liability in the cases posited by Kaiser. *See, e.g., Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co., supra,* 467 F. Supp. at 860 (coordination of pricing not unlawful); *Thomsen* v. *Western Electric Co., supra* (non-competition agreements affecting only the affiliated corporation upheld); *Reisner* v. *General Motors Corp., supra,* (consultation regarding refusal to sell not unlawful).[39]

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[39] Petitioners also argue that the doctrine should be abandoned because in the last 35 years there have been 190 "reported decisions" involving the issue. A review of petitioners' listing of cases reveals double counting of appellate and trial court decisions, (*e.g.*, Cert. App. H case nos. 4 & 14, 7 & 19, 21 & 52, 16 & 54, 33 & 71, 35 & 72, 65 & 91, 81 & 95, 64 & 99, 32 & 102, 77 & 103, 79 & 105, 97 & 111,

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2. Petitioners assert that the decisions of this Court inhibit efficiency by discouraging the creation of subsidiaries which could "secure efficiencies not obtainable through unincorporated divisions." (Pet. Br. 20)[40] There is absolutely no support, however, for the notion that the creation of subsidiaries has been deterred by reason of the Court's decisions.[41] Since liability is imposed on affiliated corporations only for engaging in predatory conduct, businesses would be discouraged from establishing or autonomously operating subsidiaries only if there were a desire to engage in such conduct. Thus, formation of subsidiaries for legitimate purposes is not discouraged.

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101 & 113, 109 & 122, 77, 125 & 148, 143 & 145, 142 & 146, 164 & 167, 170 & 173) and inclusion of decisions where the issue of parent-subsidiary combination under Section 1 was not involved at all or was only a minor aspect of the decision (*e.g.*, Cert. App. H case nos. 10, 17, 24, 25, 28, 29, 32, 37, 45, 52, 57, 61, 64, 78, 89, 102, 104, 118, 133, 138, 152, 153, 165, 168, 172, 174, 175, 178, 179, 180, 181, 184, 185, 186). Moreover, this Court recently rejected a similar contention involving a much larger number of antitrust cases stating that it "cannot be a controlling consideration here. We must take the statute as we find it." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 344 (1979). *See also Id.* at 345-46 (Rehnquist, J., concurring). Petitioners also assert that the doctrine "preclude[s] summary judgment." (Pet. Br. 25) Yet, a substantial number of parent-subsidiary conspiracy claims have been summarily dismissed. (*See. e.g.*, Cert. App. H case nos. 4, 7, 13, 15, 21, 22, 26, 30, 39, 46, 47, 48, 50, 56, 60, 66, 68, 69, 70, 73, 77, 82, 83, 85, 93, 94, 98, 127, 130, 137, 139, 141, 157, 158)

[40] Petitioners' arguments are inherently inconsistent. Thus, they contend that the difference between a corporate subsidiary and unincorporated division is mere "form," yet they argue that incorporation is often necessary to achieve significant "efficiencies." (*Contrast* Pet. Br. 15-18 *with* 18-21.)

[41] The available empirical data indicate that the use of subsidiaries has grown enormously since the turn of the century. P. Blumberg, *Law of Corporate Groups* 463 (1983). Potential antitrust liability is not a factor which management experts identify as a disadvantage in the creation of corporate subsidiaries. *See, e.g.*, J. Wert and G. Henderson, Jr., *Financing Business Firms* 506-07 (6th ed. 1979).

Moreover, an unincorporated division may be operated to achieve efficiencies that derive from decentralization, but incorporation is necessary to obtain certain legal rights and privileges. These corporate privileges have the potential for enhancing autonomy (*e.g.*, limitation of liability, the right to engage in contracts and hold assets), but they have little to do with "real efficiency." (691 F.2d at 317; Cert. App. A-10) *See generally* O. Williamson, *Markets and Hierachies: Antitrust Analysis and Implications* ch. 8 (1975). In any event, this Court has never considered internal corporate efficiency as a primary Sherman Act goal, particularly when it is balanced against the statute's fundamental objective to protect competition. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 68-69 (1977) (White, J., concurring).[42]

3. Petitioners have raised the false spectre of *per se* illegality for activities of affiliated firms. In fact, as one *amicus* admits, the lower courts have declined to apply the *per se* rule to the joint conduct of affiliated firms. (Canadian Br. 18) In the instant case, the rule of reason analysis was applied, and the jury was instructed that Independence was required to prove an unreasonable restraint of trade by establishing an increase in price or restriction in product supply in the relevant market as a result of petitioners' conduct. The Court of Appeals found that the evidence amply supported the jury's finding of such an unreasonable restraint. (691 F.2d at 321-23; Cert. App. A-19-22)[43]

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[42] Under Section 7 of the Clayton Act, this Court and the Justice Department have rejected efficiency as a proper counterweight to the broader goal of protecting competition. *See FTC* v. *Procter & Gamble*, 386 U.S. 568, 580 (1967); United States Department of Justice, *Merger Guidelines* 42-43 (1982).

[43] One *amicus* suggests that this Court "make clear that *per se* rules have no application to the relationships between affiliated companies." (Canadian Br. 19 n.36) As the Court of Appeals indicated, such a ruling may well serve "as a prophylactic against unduly expansive antitrust liability." (691 F.2d at 322 n.19; Cert. App. A-21 n.19) However, since a rule of reason analysis was applied here, the Court need not reach that issue.

4. Petitioners argue that the principles established by the decisions of the Court concerning affiliated firms lack predictability. However, businessmen should expect that predatory activities designed to prevent the entry of a new competitor might result in antitrust liability, and it is such activity, not solely corporate form, which gives rise to liability.

Petitioners here were well aware of the antitrust risks of their behavior. Early in their campaign against Independence, Copperweld and Regal were advised that their activities might violate the antitrust laws. For example, Copperweld's law firm admonished:

> We must be careful not to open ourselves up to an antitrust suit by Grohne that we have harassed potential financial and equipment suppliers from doing business with him, thus restricting competition. (PX 449 at 3; J. App. A-99)

A month later, their attorneys again advised:

> Instituting an action now, even though unsuccessful, might have some good effects but I am afraid we would be met with a counterclaim that would pose serious problems. (PX 481; J. App. A-102)

In spite of these clear warnings that their conduct raised serious antitrust questions, Copperweld and Regal were undeterred.

Petitioners and *amici* claim, however, that in other cases it may sometimes be difficult to distinguish between internal management decisions that might have an incidental effect on third parties and joint conduct directed at restraining the trade of third parties. Yet, in practical application, the courts have had no difficulty in making that distinction, and neither should businessmen.[44]

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[44] Indeed, the courts undertake a similar determination in other antitrust contexts. *See Pacific Stationery & Printing Co.* v. *Northwest Wholesale Stationers, Inc.*, 1983-2 Trade Cas. (CCH) 65,616 (9th Cir. 1983); *Hawaiian Oke, supra.*

Here, for example, there was absolutely no connection between petitioners' conduct and the formulation of internal policies. The conduct here was nothing more than a blatant attempt to exclude a competitor by shutting off its sources of supply. Copperweld and Regal knew full well what they were doing as indicated by numerous documents establishing their intention to "stop Grohne," "follow his activities like a hawk," "block Grohne," "pounce on him," and "be on him like a hawk." (PX 1055, 430, 478, 479; J. App. A-91, 100, 101) Yoder certainly understood that petitioners' actions were undertaken "with the intent to scare off potential suppliers and customers" of Independence. (PX 77)

5. The government similarly expresses concern that "[i]t often is difficult in practice . . . to distinguish between 'hard' competition that benefits consumers (even if it harms rivals) and conduct that will have the long term effect of lessening competition and consumer welfare." (U.S. Br. 10) The government's argument, however, provides no basis for concluding that antitrust laws should not apply in cases, such as this, where there clearly was a "lessening of competition and consumer welfare." (*Id.*) Copperweld and Regal were not engaging in "hard competition." To the contrary, they were seeking to *avoid* hard competition with a more efficient, price-cutting firm when they sought to preclude its entry.

Since passage of the Sherman Act, defendants have contended that the Act is uncertain in "its application to various specific fact situations." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 598-99 (1976). However, this Court has repeatedly rejected such arguments as a basis for adopting either *per se* rules of lawfulness or judicial exemptions. As the Court has stated, the Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for

escape." *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 359-60 (1933).[45]

6. Petitioners and *amici* also attempt to create the illusion that academic discussion is uniformly critical of the principles established by the decisions of this Court. That is incorrect. Respected antitrust authorities specifically support the application of Section 1 in circumstances such as those presented in this case. *See, e.g.,* J. von Kalinowski, *Antitrust Laws and Trade Regulation* 6.01(2)(c)(i) 6-28-31 (1982) ("Although the plurality of actors consists only of related entities, an immunity from antitrust liability is inappropriate because of the effect of the challenged conduct on outsiders."); L. Sullivan, *Law of Antitrust* 328 (1977) ("concerted action by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade."); F. Easterbrook and R. Posner, *Antitrust Law* 730 (2d ed. 1981) ("Activity within a firm or family of commonly-owned corporations is of legitimate concern only when the entity is able to exclude competition by *other* economic units. In other words, the proper question is whether there has been an exclusionary practice.")

III. PETITIONERS' PROPOSAL IS INCONSISTENT WITH ANTITRUST LAW AND POLICY.

A. Petitioners' Proposal is Inconsistent with Antitrust Objectives.

Petitioners pay lip service to this Court's admonition in *Yellow Cab* that substance should prevail over form. (Pet. Br. 42) Yet, they seek the overruling of *Yellow Cab* and the

[45] In a recent case under Section 8 of the Clayton Act, counsel for petitioners here argued that the need for predictability dictated that parents and subsidiaries should *always* be treated as separate persons. (Respondent's Joint Appeal Brief at 43-47, *In the Matter of Borg-Warner Corp. et al.,* 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983))

subsequent cases which give effect to that premise and propose instead the adoption of a rule which is purely formalistic. Thus, rather than examining the substance of the relationship and the anticompetitive consequences of the conduct at issue, petitioners would have this Court blind itself to such matters and determine antitrust policy solely on the basis of percentages of paper ownership.[46] Petitioners' proposal ignores the most basic purpose of Section 1 by seeking to immunize conduct such as that found here which has had a demonstrably adverse effect on competition.

This Court's decisions clearly indicate the impropriety of a distinction based solely on majority stock ownership which, in itself, may have little relevance to actual control. In *Yellow Cab*, the affiliations ranged from 18% to 100% stock ownership. (Brief for the United States at 40, *United States* v. *Yellow Cab Co., supra*) *Kiefer-Stewart* and *Perma Life* involved two wholly-owned subsidiaries, and *Timken* involved 30% and 50% stock ownership. Under petitioners' suggested approach, some of those cases would automatically have been decided differently without regard to the effect of defendants' activities. Such mechanical rules which can achieve random results have always been rejected by the Court, precisely because the infinite variety of circumstances which may arise "make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Associated General Contractors of California* v. *California State Council of Carpenters*, 103 S. Ct. 897, 908 (1983).

Petitioners' proposal would also ignore the legal entity of the corporation and would create a legal fiction consisting of all affiliated firms (the "enterprise"), which would be considered a

[46] In the analysis of parent-subsidiary relationships in other areas of the law, majority stock ownership and common directors have been "uniformly dismissed as inconsequential in and of themselves." P. Blumberg, *The Law of Corporate Groups* 1718 (1983).

single legal person under the antitrust laws. Such a concept is foreign to the statute and its legislative history, and would allow petitioners to derive all of the advantages of separate incorporation while avoiding all of the obligations flowing therefrom.[47] Copperweld affirmatively relied upon Regal's legal and functional separateness to avoid liability in *Ayers* v. *Copperweld Corp.*, 487 F. Supp. 593, 594 (S.D. Tx. 1980). There, the court granted Copperweld's motion to dismiss because of the absence of such "degree of control" of Regal to justify disregarding their legal separateness. Of course, now that it is to petitioners' advantage to do so, they seek the creation of a new rule of law holding they are legally one. (*See* Cert. App. B-15-16)

Contrary to the contentions of petitioners and the government, their proposal would also conflict with other provisions of the antitrust laws. For example, under Section 2 of the Sherman Act, autonomously operated parent and subsidiary corporations may be found liable of conspiring together to monopolize a market. *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1342 n.2 (D.D.C. 1981); *Perington Wholesale, Inc.* v. *Burger King Corp.*, 631 F.2d 1369, 1376-77 (10th Cir. 1979). On the other hand, where it is determined that a parent corporation exercises "close articulation of control" and "direction of the policies of (subsidiary) companies as a whole" the affiliated corporations are considered together, and the offense of monopolization may be found. *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 253, 257 (D.R.I. 1964), *aff'd and remanded on other grds.*, 384 U.S. 563 (1966).[48]

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[47] On the other hand, a logical application of petitioners' "enterprise" proposal would hold a parent liable for *all* of the acts of its subsidiaries, a truly revolutionary result.

[48] Petitioners' reliance on Section 7 of the Clayton Act, 15 U.S.C. §18 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a, is misplaced. (Pet. Br. 45) The explicit language of Section 7 prohibits certain acquisitions "directly or indirectly," i.e.,

(Footnote continued on following page)

Similarly, under Section 8 of the Clayton Act, 15 U.S.C. 19, which proscribes interlocking directorates between competing corporations, the business of an autonomously operated subsidiary will not be attributed to the parent corporation in determining whether the parent and a third corporation compete. *See, e.g., Kennecott Copper Corp.* v. *Curtiss-Wright Corp.*, 584 F.2d 1195, 1205 (2d Cir. 1978). The Federal Trade Commission recently concluded that under Section 8, the degree of stock ownership is not determinative. *In the Matter of Borg-Warner Corp., et al.*, 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983). There, the Commission found a violation with respect to one subsidiary because of the parent's actual dominance, but refused to find a violation with respect to another subsidiary because of the absence of such control. (*Id.* at 22,663, 22,665) The Commission concluded that a blanket rule considering only stock ownership and ignoring the actual control exercised by the parent would "elevate form over substance." (*Id.* at 22,666)[49]

(Footnote continued from preceding page)

through an affiliated corporation. Since Section 7 addresses *probable* anticompetitive effects, aggregation of market shares of affiliates is necessary because centralized control may occur. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

[49] The courts and the FTC have also long used a control test under the Robinson-Patman Act, 15 U.S.C. §13, to determine whether a subsidiary and its parent corporation constitute separate sellers and whether a sale between a parent and subsidiary qualifies as a "sale" under the Act. The determinative factor in each instance is the actual exercise of control, not the percentage of stock ownership. *See, e.g., National Lead Co.* v. *FTC*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); *In the Matter of Warren Petroleum Corp.*, 53 F.T.C. 268, 271-72 (1956); *Brewer* v. *Uniroyal, Inc.*, 498 F.2d 973, 977 n.2 (6th Cir. 1974). No other circuit court has adopted the holding of *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), upon which petitioners rely. *See Schaben* v. *Samuel Moore & Co.*, 606 F.2d 831, 833 n.3 (8th Cir. 1979).

(Footnote continued on following page)

Petitioners' proposal would similarly "elevate form over substance" by creating an artificial distinction between 50% ownership and 50% ownership plus one share without consideration of whether this *de minimus* difference in ownership results in any difference in competitive consequences. As to corporations affiliated through 50% or less stock ownership, however, petitioners' proposal would presumably retain the present standard. Thus, despite all their criticism, petitioners ultimately acknowledge the propriety of this standard for determining antitrust liability.[50]

B. Other Laws are Inadequate to Prevent Anticompetitive Activity of Affiliated Corporations.

Petitioners and *amici* acknowledge that activities of affiliated corporations may raise serious antitrust concerns. Indeed, petitioners make no attempt to defend their anticompetitive conduct. They assert, however, that Section 2 of the Sherman Act, Section 5 of the FTC Act, 15 U.S.C. § 45, and state tort laws may be invoked, yet none of these provisions is an adequate substitute for Section 1.

As noted in part I.A., *supra*, Section 1 was intended as the primary proscription of unreasonable restraints of trade. Section 2 was viewed as a supplement to Section 1 to insure that no seriously anticompetitive activity would escape statutory coverage. In light of this congressional intent, Section 1 has been broadly interpreted to prohibit trade restraints in various forms,

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(Footnote continued from preceding page)

Similarly, under Section 12 of the Clayton Act, 15 U.S.C. § 22, venue cannot be obtained over a parent corporation by virtue of its subsidiary's business in the jurisdiction unless the parent exercises actual control over the subsidiary. *King* v. *Johnson Wax Associates, Inc.*, 565 F. Supp. 711, 717-19 (D. Md. 1983).

[50] Similarly, a rule insulating only wholly-owned subsidiaries and their parents from Section 1 would create a wholly artificial distinction between 100% and 99% stock ownership where no practical significance attaches to such a difference in percentage ownership.

including those imposed through joint conduct of affiliated corporations. In contrast, the monopolization and attempt to monopolize prohibitions of Section 2 have been accorded more limited application and have been applied only where monopoly has been achieved or where there is a dangerous probability thereof as evidenced by substantial market share percentages. *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951). Therefore, as the courts have construed the statute, Section 2 does not adequately address the potential anticompetitive activities of affiliated corporations. The *Attorney General's Report* recognized this and concluded that Section 1 should be applied to coercive conduct of a parent and its subsidiary "though short of an attempt to monopolize." (*Attorney General's Report, supra,* at 35)

Due to the market share requirement, Section 2 is particularly inadequate to address situations, such as that presented here, in which affiliated corporations operating in different markets combine their separate economic power to restrain trade in one of those markets. *See Report to the President and the Attorney General of the National Commission for the Review of the Antitrust Laws and Procedures,* 144-45, 168 n.11 (1979) (hereafter *"Report of the National Commission"*)("the ability of Section 2 to reach obviously anticompetitive conduct has been impaired by an overly restrictive standard").

Petitioners and *amici* obviously recognize this "restrictive standard" of Section 2 as an opportunity to escape liability. Therefore, they now seek to have the Court reduce the scope of Section 1 without any change in the scope of Section 2. As a result, all joint anticompetitive conduct of affiliated corporations short of a dangerous probability of monopoly would be excused from coverage under the Sherman Act.

Section 5 of the FTC Act is equally inadequate. Not only is there no private right of action under Section 5, but it has rarely been invoked by the Commission to attack the type of conduct involved here, and neither the petitioners nor the *amici*

cite any cases in which Section 5 has been so used. Indeed, their reliance on Section 5 is a perverse twist of this Court's holdings that Section 5 encompasses the provisions of the Sherman and Clayton Acts. *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966); *Fashion Originators' Guild of America, Inc.* v. *FTC.*, 312 U.S. 457 (1941).[51]

Petitioners' attempt to displace the Sherman Act with state tort laws is equally unavailing. In fact, it was the inadequacy of state law which gave rise to the need for the Sherman Act in the first instance. *See, e.g.*, 21 Cong. Rec. 2456 (1890) (statement of Sen. Sherman). Anticompetitive conduct does not necessarily constitute knowing interference with a contract or other violations of state tort law. More importantly, the application of state tort law to anticompetitive conduct does not insulate that conduct from the antitrust laws. As this Court recently stated, "we can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts. . . ." *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 569 (1982).[52]

Adoption of petitioners' proposal would not only be improper as a matter of antitrust law and policy, but would be a grave injustice to respondent. Respondent has been undeniably injured by an incontrovertible restraint of trade that caused substantial damage to competition in the structural steel tubing

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[51] Leaving the joint conduct of affiliated corporations to be judged under Section 2 and Section 5 would not provide the predictability petitioners claim to be seeking. Both sections have been soundly criticized for their lack of predictability. *Report of the National Commission, supra*, at 144, 165, 167-68 nn.7-8 (1979) ("the scope of [Section 2] is much disputed and remains unclear"); Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47 (1969).

[52] Even where state tort law is violated it does not provide an adequate remedy for anticompetitive conduct. Here, for example Respondent expended an amount almost equal to its actual damages in prosecuting this case. (Cert. App. C)

market. Respondent submitted its claim to adjudication in reliance upon this Court's long standing doctrine which petitioners themselves affirmatively adopted in their proposed jury instruction. Retroactive application of a change in that doctrine as sought by petitioners would be contrary to the basic principles of equity recognized by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971). *See also Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 103 S. Ct. 3492, 3510 n.12 (1983) (Powell, J., concurring); *id.* at 3510-11 (O'Connor, J., concurring).

IV. CREATION OF AN ANTITRUST EXEMPTION FOR AFFILIATED CORPORATIONS IS WITHIN THE PROVINCE OF CONGRESS.

Petitioners urge the Court to adopt their "proposed rule" creating an exemption from Section 1 of the Sherman Act for the joint conduct of affiliated corporations regardless of its anticompetitive consequences. In so urging, they ask the Court to overrule 80 years of uninterrupted decisions specifically holding to the contrary. Despite numerous amendments to the Sherman Act by Congress, no legislative attempt has been made to overturn those decisions, clearly indicating congressional ratification of this Court's interpretation of Section 1. *See Herman & MacLean* v. *Huddleston*, 103 S. Ct. 683, 689 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982).[53]

[53] Congress has not hesitated to amend the antitrust laws when a decision of the Court is perceived as leading to an inappropriate result. *See, e.g., Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978) (foreign governments entitled to treble damages) and the Foreign Government Damage Recoveries Act of 1982, Pub. L. No. 97-392, § 2, 96 Stat. 1964 (1982) (amending Section 4 of the Clayton Act to limit foreign governments to single damages); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975) and the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 6(a), 94 Stat. 1154 (1980).

Beyond the fact that the decisions of the Court clearly comply with congressional intent, this Court is also guided by the doctrine of *stare decisis*, which "demands respect in a society governed by the rule of law." *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2487 (1983). *Stare decisis* is not only necessary for orderly adjudication, but it also promotes the broader societal interests in evenhanded, consistent and predictable application of legal rules. *TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

Application of the doctrine is particularly appropriate here because (1) a statutory, not a constitutional interpretation, is at issue; (2) the question has been repeatedly examined by the Court with considerable care; and (3) the Court's decisions span several decades. *City of Akron, supra*, 103 S. Ct. at 2487 n.1. Where statutory construction is involved, "considerations of *stare decisis* weigh heavily" because "Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977). In such cases, a challenger must make "a particularly strong showing . . . that [the Court has] misread the relevant statute and its history." *Patsy* v. *Board of Regents of the State of Florida*, 457 U.S. 496, 517 (1982) (White J., concurring). Petitioners have made no attempt to show that this Court has misread the statute and the legislative history. To the contrary, the Court's decisions are a clear and correct manifestation of the statutory language and legislative intent. *See* I.A., *supra*.

Just last term, in response to a request by the government to rewrite Section 8 of the Clayton Act after 60 years of consistent interpretation, this Court stated:

> While it is arguable that wise antitrust policy counsels against permitting interlocking directorates between banks and competing insurance companies, that policy must be implemented by Congress, and not by a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long. If changes in economic factors or considerations of public policy counsel the extension of the Clayton Act to

> the categories of interlocking directorates implicated here, it is a simple matter for Congress to say so clearly. (*BankAmerica Corp.* v. *United States, supra,* 103 S. Ct. at 2273)

This Court has repeatedly held that major reversals of antitrust law and policy such as that sought by petitioners should only be made by Congress. *Illinois* v. *Abbott & Associates, Inc.,* 103 S. Ct. 1356, 1364 (1983); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.,* 103 S. Ct. 1282, 1289 (1983); *Arizona* v. *Maricopa County Medical Society,* 457 U.S. 332, 354-55 (1982).[54] Indeed, in *Timken, supra,* the Court specifically ruled with respect to a request for exemption of affiliated corporations from Section 1 coverage that, "if such a drastic change is to be made in the statute, Congress is the one to do it." (341 U.S. at 599)

The arguments raised by petitioners and the government involve the reassessment of competing economic theories and basic public policy considerations. If there were to be a reconsideration of fundamental antitrust objectives, Congress could best resolve such issues through the weighing process of legislative analysis, hearings and debate. *United States* v. *Topco Associates, Inc.,* 405 U.S. 596, 611-12 (1972). *See also Reiter* v. *Sonotone Corp., supra,* 442 U.S. at 344-45. There are

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[54] The Court's adoption of a rule of reason analysis in preference to *per se* treatment of certain vertical restrictions in *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), only 10 years after its decision in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), is not an apt analogy for the action requested here. (U.S. Br. 27-28) In *Continental T.V.,* the Court simply revised its own standard of proof after a relatively short period of time. It did not purport to create an exemption for conduct recognized to be anticompetitive since the inception of the Act. The Court has never considered itself free to completely exclude entire segments of commerce from Sherman Act coverage. *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 787 (1975).

not only constitutional,[55] but practical, considerations for the Court's deference to Congress on such questions. Congress is simply in a better position than the Court to evaluate the desirability of changes in statutory law. *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532 (1982).

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[55] *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 317-18 (1980); *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979); *TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

CONCLUSION

For the foregoing reasons, respondent respectfully submits that the judgment below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

Our opening brief and the *amicus* briefs of the Solicitor General and the major business groups clearly show the uncertainty and lack of principle in the "all the facts and circumstances" test employed by the Seventh Circuit to resolve the troublesome issue of intra-enterprise "conspiracy."[1] Unable to respond to these decisive criticisms, respondent has turned to a blizzard of factual details supporting the tort verdict it already has received, and has substi-

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[1] *See, e.g.*, Pet. Br. at 33-35; Brief for the United States ("U.S. Br.") at 23-24; Brief of the Chamber of Commerce of the United States and the National Association of Manufacturers ("Chamber/NAM Br.") at 10-12; Brief of the Kaiser Aluminum & Chemical Corporation ("Kaiser Br.") at 15-17.

tuted a novel two-part test designed to provide antitrust treble damage recovery for the same tort.

Respondent's bipartite test pays lip service to the Seventh Circuit's multi-factored inquiry into whether the affiliated corporations "functioned as distinct economic units," but places its major emphasis on "whether each corporation engaged in activities to unreasonably restrain the trade of third parties." (Resp. Br. 13; States Br. 5) This dualistic approach has, so far as petitioners can determine, no precedential support:

—It was not adopted by the trial court, either in its instructions to the jury or its rulings on post-trial motions;

—It was not accepted by the court of appeals;

—It has never been articulated in any opinion by this Court; and

—It does not appear in the language of the Sherman Act or its legislative history.

Respondent's test would compound, rather than eliminate, the critical flaws in the intra-enterprise conspiracy doctrine. What is required is a clear and well-grounded rule—as proposed by petitioners, the United States, the business community, and respected commentators—that a parent and its wholly-owned subsidiary do not provide the plurality of actors required for a conspiracy under Section 1 of the Sherman Act.

I. Neither The Act, Its Legislative History, *Stare Decisis*, Nor Administrative Practice Precludes Reassessment Of The Intra-Enterprise Conspiracy Doctrine.

The very fact that respondent and the *amici* States have themselves fashioned a new and untried approach to the intra-enterprise conspiracy doctrine undermines their claim that this Court is barred by its prior opinions, the statutory language and history or earlier views of the federal enforce-

ment agencies from reexamining the doctrine. (Compare Resp. Br. 15-33) The plain truth is that the doctrine was never considered during the legislative proceedings, which is why no court or commentator has relied on those proceedings in considering whether a parent and a wholly-owned subsidiary can alone constitute a plurality of actors. While this Court's own opinions are concededly more to the point, the court below and numerous scholars have regarded much of the Court's treatment of the intra-enterprise conspiracy issue as dicta. (691 F.2d at 318; Cert. App. A-12; Pet. Br. 25-32) Whatever the characterization of the prior opinions, it is evident that the doctrine is a creation of this Court. As such, it is open to reformulation to resolve the "continuing controversy and confusion, both in the scholarly journals and in the federal courts." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 47 (1977).

A. The statutory scheme does not require continuation of the current doctrine.

Respondent's assertion that, because the statute prohibits "every form of concerted activity," it necessarily applies to agreements among affiliated businesses, is unsupportable. (Resp. Br. 15) This Court stressed in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687 (1978), that this all-encompassing language begins, rather than ends, the inquiry: "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says." What concerted activity should be covered must be based on a careful assessment of the overall statutory scheme.

As emphasized by petitioners and the United States, the Act distinguishes (a) conduct such as the trust device that reduces the number of truly independent economic decisionmakers (the subject of Section 1), from (b) conduct that is unilateral in effect (the subject of the more limited sweep of Section 2). To have an agreement or conspiracy within the meaning of the statute, there must be separate actors undertaking to do something they would not have otherwise done independently. (Pet.

Br. 43 n.34) Where, as here, a parent and a wholly-owned subsidiary are not independent entities but are lawfully joined as a single economic enterprise, their activities properly fall outside the scope of Section 1, notwithstanding that, for reasons of efficiency or convenience, they have adopted separate legal existences.

This purposeful distinction between Sections 1 and 2 is neither "novel" nor "artificial," as respondent contends. (Resp. Br. 20-21) Rather, it has been explicitly recognized by courts and commentators alike. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-89 (8th Cir. 1981); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 67 (1981).

Accordingly, there is no merit to respondent's claim that petitioners are seeking an "exemption" from the Act. (Resp. Br. 58) On the contrary, petitioners seek to give effect to the plain intention of the statute by asking this Court to recognize that action on the part of a parent and its wholly-owned subsidiary is not the action of two independent entities, but is in fact the action of a single economic and competitive entity, which should properly be adjudged under Section 2, not Section 1.

B. The legislative history never addressed the doctrine.

The legislative history does not "establish," as respondent urges (Resp. Br. 15 *et seq.*), that a parent and its wholly-owned subsidiary must be regarded as capable of "conspiracy" under Section 1. Despite a large and growing body of case law and extensive scholarly analysis, respondent is unable to cite a single opinion or commentator that has looked to the legislative proceedings as the source of the doctrine. Rather, these authorities uniformly follow the court below in finding its genesis in "sweeping Supreme Court dicta," commencing with *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), which never mentioned the legisla-

tive debates as a basis for applying the doctrine. (691 F.2d at 318; Cert. App. A-12)

The reason for this void is that Congress did not address the question of "conspiracy" between parent and subsidiary during the 1890 debates, much less the later intra-enterprise conspiracy doctrine or respondent's current reformulation. Respondent's attempt to create the contrary impression from scattered legislative remarks, such as its claim that Senators Sherman and Teller "alluded" to the doctrine (Resp. Br. 20), is both misleading and misconceived. In point of fact, there is not a single passage from the legislative debates in which a "conspiracy" solely between a parent and its wholly-owned subsidiary was discussed.

Typical of respondent's strained attempt to find significance in innocuous statements from the floor is its quotation from Senator Sherman to the effect that, "whether . . . combinations are by individuals, partnerships, or corporations, when the purpose of the combination or its plain tendency is to prevent competition, the courts have enforced the rule of the common law and have vigorously used the judicial power in subverting them." (Resp. Br. 19; quoting 21 Cong. Rec. 2459 (1890)) This recites nothing more than the long-standing rule that a conspiracy may involve "individuals, partnerships, or corporations." It says nothing about whether such a conspiracy may be found among wholly-owned affiliates or their officers and employees.

Most of respondent's other legislative history comes down to generalized statements about the dangers of "combinations." These statements merely demonstrate that the framers' principal target was the "trust," a device by which a group of previously independent corporations were combined or merged into a new entity to achieve anticompetitive purposes. Contrary to the contention of respondent and the *amici* States (Resp. Br. 19-20; States Br. 10), Section 1 was extended to "combination[s] in the form of trust or otherwise" to ensure that all means used by competitors unlawfully to merge or combine would be covered, not to

broaden the section's coverage to cases of purely intra-enterprise "conspiracy."

C. This Court is not constrained by *stare decisis* from reevaluating the intra-enterprise conspiracy doctrine.

Consistent with the weight of scholarly opinion, petitioners' opening brief demonstrated that the intra-enterprise conspiracy doctrine was unnecessary to all or nearly all of the Court's decisions in which it has figured. (Pet. Br. 25-32) This was not, as respondent argues, an attempt to "explain away" this Court's prior cases. (Resp. Br. 24 n.14) Rather, it was designed forthrightly to show that this Court has never addressed, or been required to address, the serious theoretical and practical objections to the doctrine. Accordingly, a reexamination of the doctrine is both appropriate and consistent with *stare decisis*.

Respondent is on especially weak ground when it argues that the Court is bound on the intra-enterprise conspiracy issue by the "first Sherman Act cases to reach this Court." (Resp. Br. 22) Neither the lower courts, the commentators nor the later line of cases originating with *Yellow Cab* relies on these earlier authorities as a basis for the doctrine. Just as respondent has done in its discussion of the legislative history, it misreads broad statements about trusts and combinations among previously independent corporations as statements relating to the activities of affiliated corporations that have already lawfully combined. To the extent the early cases discussed the conduct of "trusts" after their formation, they did so either in the context of a companion charge under Section 2 or as the fruit of an unlawful combination.

While *Yellow Cab* was thus the genesis of the intra-enterprise conspiracy doctrine, it did resemble the earlier cases in holding that corporate acquisitions that are designed to achieve an unreasonable restraint of trade violate Section 1. It was in this context that *Yellow Cab* announced that such a restraint "may result as readily from a conspiracy among

those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." (332 U.S. at 227) Although this language accurately stated the law with respect to the conduct of an enterprise that was itself the product of unlawful affiliation (as with the early trusts), the Court did not so limit its language. It was the resulting dicta that gave rise to the intra-enterprise conspiracy doctrine.

The *Yellow Cab* language was repeated but without further analysis in a series of cases, including *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110 (1948), *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). Among these early decisions, only Justice Jackson's dissent in *Timken* examined the critical problems with the doctrine, which he said placed "too much weight on labels" by artificially dis nguishing between unincorporated divisions and subsidiaries. (341 U.S. at 607) That criticism was echoed in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), where the Court suggested that the doctrine "impose[s] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." (*Id.* at 29)

The *Yellow Cab* dicta was nevertheless resurrected in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968). But Justice Black's broad implication there that a parent and its subsidiary are *always* capable of conspiracy, contrasts with the Court's conclusion only seven years later in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975) that considerations of economic reality and antitrust policy should limit the doctrine's application. The shifting fortunes of *Yellow Cab* hardly constitute the "unchanging analysis" claimed by the *amici* States. (States Br. 12)

The end result has been thoroughgoing confusion on the part of those seeking to apply this Court's rulings. Respondent has no answer to—indeed does not mention—the conflict

among the circuits. Moreover, respondent glosses over the difficult counseling problems that have been created by the lower courts' inability to devise a consistent and principled rule. Although respondent tries to sweep aside the academic criticism of the doctrine, its own authorities acknowledge that "[s]cholars and commentators have been uniformly critical" of this Court's rulings. (R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes and Other Materials* 730 (2d ed. 1981); cited at Resp. Br. 51)

In short, respondent errs in asserting that *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra*, "is not an apt analogy." (Resp. Br. 60 n.54) Just as in *GTE Sylvania*, this Court is called upon to reconsider a doctrine that has become an "exercise in barren formalism" and "unresponsive to the competitive needs of the real world." (433 U.S. at 47, 48 n.13) The existing rule has generated tremendous confusion among the lower courts as they have "struggled to distinguish or limit [the Court's prior decisions] in ways that are a tribute to judicial ingenuity." (*Id.*) And here, too, "the great weight of scholarly opinion has been critical of the decision" and has called for its elimination. (*Id.* at 47-48)

D. The current and considered views of the antitrust enforcement agencies should be given great weight.

In response to the express invitation of this Court, the Solicitor General stated the views of the United States Department of Justice and the Federal Trade Commission, in support of certiorari. They have since filed a carefully reasoned brief urging the adoption of the same rule as that advanced by petitioners. This is not a "revisionist view," as respondent would like this Court to believe (Resp. Br. 32), but a well-considered articulation of what are now well-accepted antitrust and economic principles.

Although respondent asserts that the government has "repeatedly initiated enforcement actions" based on the earlier intra-enterprise conspiracy doctrine, it is unable to cite a single case in the last 15 years where the government has

alleged a conspiracy solely between a parent and its wholly-owned subsidiary.[2] Respondent's efforts to piece together a contrary position from the scattered statements of Justice Department officials is equally misplaced. Respondent confuses statements of what the law *appeared to be* with what the officials believed the law *should be*. Indeed, respondent's assertion that then Assistant Attorney General Turner endorsed the doctrine ignores his statement immediately preceding the language quoted in respondent's brief (Resp. Br. 31):

> "We certainly don't generally favor a bathtub conspiracy charge and, in fact, it is not the happiest of legal doctrines in any context." (34 ABA Antitrust L.J. 113, 122-23 (1967))

Respondent and the *amici* States also misinterpret the twenty-five year old *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955). The *Report* was not a statement of government policy. Moreover, while some Committee members sought to reconcile this Court's early decisions by suggesting a distinction between parent-subsidiary activities directed at "the trade of strangers" and those of an "internal" nature, the only *consensus* reached by the Committee was that:

> "It is obviously unrealistic to expect or to command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart*, or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it." (*Report* at 36)

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[2] The recent cases referred to in Resp. Br. 30 n.20 all involved conspiracies with third parties. Respondent's frequent reliance on the government's brief in *Citizens & Southern* is misplaced. *Citizens & Southern* involved an effort to impose liability on affiliated defendants where only 5% stock ownership was present. This is not inconsistent with the government's assertion here that the intra-enterprise conspiracy doctrine should not be applied when more than 50% ownership is present.

II. Respondent's Proposed Test Is Without Precedential Support And Fails To Resolve The Doctrine's Critical Policy And Practical Shortcomings.

The final irony in respondent's *stare decisis* argument is that nowhere in this Court's opinions (or the legislative history for that matter) is there any mention of the two-part test now advanced by respondent and the *amici* States. Even the Seventh Circuit did not adopt the suggestion that a "restraint on third parties" standard should become part of its "all the facts and circumstances" approach to the capacity issue, although the point was expressly urged in respondent's brief below. (Br. of Appellee 29-33) Likewise, the district court's capacity instructions contained no reference to "restraint on third parties," despite respondent's request that it be included. (*See* Pet. Br. 37-38)

The "third-party restraint" test only aggravates the uncertainties that already exist in the "all the facts and circumstances" test. Respondent asserts that the Seventh Circuit's test is concerned with whether parent and subsidiary are "distinct" economic units (Resp. Br. 33), but it identifies *no factors* that can or should be used for making this determination. Rather respondent engages in definition by repetition. It refers to "functional separateness," "separate economic operating units," "real, rather than merely formal, distinctness," "autonomous units," "separate actor[s]," "separate economic units," "separate businesses" and "independent business units," without ever explaining what these phrases mean or what evidence is relevant to making the requisite determination. (*Id.* at 35, 36, 37, 39, 42, 44)[3]

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[3] When applying these amorphous terms to petitioners, respondent simply tailors its selective recitation of the facts to create an impression of "distinctness," while ignoring the contrary evidence that Regal was in all important respects dominated and controlled by Copperweld, whose officers or directors held all of the offices or directorships at Regal. (*See* Pet. Br. 4 n.4)

The unfairness, as well as the unpredictability, of such an approach is dramatized by this litigation, where petitioners started the case relying on the five-factor test from *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980), were then met with the district court's nine-part instruction, and now must deal with still another formulation by respondent. What makes the result especially untoward is that the "all the facts and circumstances" test ultimately focuses on the wrong issue—namely, the supposed operational "separateness" of parent and subsidiary. As the Chamber of Commerce and NAM explain:

> "The thrust of rules such as the 'all facts and circumstances' [test]...is to find liability where subsidiary corporations, though subject to the ultimate control of the parent, are given some delegated day-to-day operational autonomy. The rules thus have the perverse effect of discouraging decentralized decisionmaking within a business enterprise, even as they are applying Section 1 on the theory that separate decisionmaking within a multi-corporate enterprise should be preserved." (Br. 12)

Respondent's assertion that Copperweld and Regal should be treated separately because each wielded its own "economic leverage" is a confusion of terms. (Resp. Br. 37) Regal had no more—nor less—economic power than it did at Lear Siegler, or than any of Copperweld's unincorporated divisions possessed. Regal was a separate legal entity, but it was not independent of Copperweld. Any "leverage" obtained by Regal through its customer and supplier relationships was in fact controlled by Copperweld, which retained ultimate authority over Regal's long-term production decisions, sales plans and finances. (Breedlove Tr. 4913, 4921-29; *see* Pet. Br. 4 n.4) Moreover, third parties were made fully aware of this control relationship, since Regal correspondence expressly identified it as "a Copperweld enterprise." (*E.g.*, Jt. App. A-81, A-97)

Further, respondent has no real response to the criticism of responsible commentators and the courts that the "third-party restraint" part of its test is "unworkable and unreal." (*Ogilvie, supra*, 641 F.2d at 588 n.20; *see also* Handler & Smart, *supra*, 3 Cardozo L. Rev. at 50-51; Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 673 n.70 (1982)) Wholly lacking in such a test is any principled basis for making the critical distinction between so-called "legitimate internal decisions" by affiliated corporations and those that "restrain" others. As the Chamber of Commerce and the NAM correctly point out in their brief:

> "In practice, most pricing, marketing, and selling policies are designed at least to affect the trade of third parties, and virtually all such decisions will in fact have an effect on competitors even if they are not so designed. A competitor who is particularly affected by such a decision and who suffers serious injury will almost always be able to state a *prima facie* claim, sufficient at least to get to a jury...." (Br. 11)

Accordingly, it is hollow to claim that businessmen will have little difficulty in distinguishing between those activities that could be subject to attack and those that will not.[4] In fact, it is hard to reconcile respondent's assertion that the "third party" standard will have only limited impact, with the States' disquieting assertion that there are "an infinite number of ways" by which a parent and its subsidiary can "restrain the trade of strangers to the corporate family." (States Br. 19-20)

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[4]Respondent's misstate the record when they suggest that petitioners were "well aware" in this case that the conduct giving rise to liability "raised serious antitrust questions." (Resp. Br. 49) There is *no evidence* that petitioners thought they were violating the antitrust laws when they sent their letter to Yoder. To the contrary, the Seventh Circuit made it clear that petitioners consulted with counsel and acted on the advice of counsel in sending the letters. (691 F.2d at 314; Cert. App. A-4)

III. This Court Should Adopt The Rule Proposed By Petitioners, The United States And The Business Community That A Parent And Its Wholly-Owned Subsidiary Are Incapable Of A Section 1 Conspiracy.

In lieu of the unwise and unworkable two-part standard proposed by respondent and the *amici* States, which would compound the deficiencies in the standard applied below, this Court should adopt the straightforward rule that a parent and its wholly-owned subsidiary do not provide the plurality of independent actors required by a proper construction of Section 1. As demonstrated in petitioners' opening brief and reinforced by the *amici* briefs of the United States and the business community, such a rule would remedy each of the four critical deficiencies that have been identified in the present intra-enterprise conspiracy doctrine. Neither respondent nor the States respond persuasively to any of these points.

A. A legal control test would eliminate the formalistic distinction between subsidiaries and divisions.

The first advantage of petitioners' proposed rule would be to "put an end to the artificial distinction between unincorporated divisions and wholly-owned subsidiaries and to the confused rulings it has generated." (Pet. Br. 42)[5] The rule would recognize that a parent and its wholly-owned subsidiary, like a parent and its unincorporated division, do not act independently, but have a unity of interests in every legal, economic and practical sense. This is brought home by the parent's undoubted power to exercise ultimate and complete

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[5] This formalism is illustrated by the result in this case. The effect here was to find Regal "distinct" from Copperweld based on Regal's control of its day-to-day operations, even though it was indistinguishable from the other businesses Copperweld has set up as unincorporated divisions, which had similar day-to-day autonomy. Here, Regal had the identical control over its operations under Copperweld as it possessed when it operated as an unincorporated division of Lear Siegler.

decision-making authority, including the authority to switch from subsidiary to divisional format.

The rule would further recognize that a subsidiary should not be treated differently merely because corporations are technically defined as "persons" under Section 8 of the Sherman Act. For sound reasons, the courts have long held that a corporation and its officers and employees—which are also defined as separate "persons"—cannot alone conspire (*see* Pet. Br. 16-17), since the corporation can only act through its officers and employees. Here, the actions of the subsidiary are always ultimately subject to the complete control of the parent.

Respondent seeks to escape these salient arguments by standing them on their head. Respondent accuses petitioners of proposing a "purely formalistic" rule that would "ignore the legal entity of the corporation and would create a legal fiction consisting of all affiliated firms (the 'enterprise')." (Resp. Br. 52) It is no "fiction," however, to treat commonly owned *legal* entities as a single unit for Section 1 purposes because they are in reality a single *economic* enterprise.[6]

Respondent further argues that, even if a parent and its wholly-owned subsididary are a single economic enterprise, they should not be allowed "to derive all of the advantages of separate incorporation while avoiding all of the obligations flowing therefrom." (Resp. Br. 53) The fallacy in the argu-

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[6]It is surprising that respondent should cite Professor Blumberg's *The Law of Corporate Groups* (1983) for a different view. (Resp. Br. 52 n.6; *see also* 43, 47) His entire text is an argument against reliance on separate incorporation:

> "Large-scale operations typically organize themselves in the form of a number, usually a larger number, of constituent companies through which the business of the group is conducted. Whatever the legal distinctions between the constituent parts of the enterprise, the parent and subsidiaries, in reality, comprise a single enterprise and, in most cases, a single integrated enterprise." (p. 37)

ment is that there is no reason to believe that the alleged "advantages of separate incorporation" have any correlation with anticompetitive consequences. On the contrary, Professor Areeda has stressed that:

> "The business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (P. Areeda, *Antitrust Analysis* ¶ 334, at 399-400 (3d ed. 1981))

Consequently, any advantages of separate incorporation should be addressed by referring to the relevant corporate, tax or other legal policies, not by perverting antitrust doctrine.

B. A legal control test would promote efficiency and consumer benefit.

The second important advantage of a wholly-owned subsidiary rule is that it permits parent firms to organize their economic enterprises on the basis of efficiency, not corporate formalities. Respondent's intimation (Resp. Br. 48) that no "real efficiency" may result, or that consumer benefits are unimportant, is effectively answered by the Chamber of Commerce and NAM, which first review the many legitimate reasons for selecting separate incorporation, and conclude:

> "All these diverse reasons for separate incorporation . . . are geared towards either affording a business enterprise an opportunity to compete or enhancing its competitive posture. In some cases, the use of separate corporations is necessary in order that the enterprise may compete at all in a particular country or state or in a particular line of business. In many cases, the result is to increase output, improve efficiency, and benefit

consumers—all objectives that a sound antitrust policy seeks to facilitate." (Br. 8)[7]

Respondent is also wrong in suggesting there is "absolutely no support" for the notion that "the creation of subsidiaries has been deterred by reason of the Court's decisions." (Resp. Br. 47) Following both *Kiefer-Stewart* and *Timken*, the defendants in those cases reorganized into unincorporated divisions. (*See* Pet. Br. 18 n.12) Moreover, each of the *amici* business groups emphasizes the disrupting effects that will flow should this Court accept the ill-defined and ill-advised standard put forward by respondent and the court below. (Chamber/NAM Br. 9-10; Can. Br. 14-15; Kaiser Br. 5, 7-8)

C. A legal control rule would reconcile the intra-enterprise conspiracy doctrine with the statutory scheme.

A third advantage of petitioners' suggested rule is that it gives effect to the distinction drawn by Congress between the scope of Sections 1 and 2. The present doctrine obscures this distinction by permitting plaintiffs "to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards." (691 F.2d at 317; Cert. App. A-10; summarizing the views of the commentators) In *Ogilvie* v. *Fotomat Corp.*, *supra*, 641 F.2d at 589, the Eighth Circuit reversed a jury finding of parent-subsidiary conspiracy for this very reason:

> "Congress has distinguished courses of conduct which are illegal when undertaken by a plurality of actors from those which are illegal when undertaken by a single entity. [Citations omitted] To impose Section 1 liability on what in reality constitutes a single economic

[7] For a particularly persuasive presentation of the reasons why the present intra-enterprise conspiracy doctrine inhibits effective foreign competition, see the *amicus* brief filed in behalf of the Canadian Manufacturers Association and the Canadian Chamber of Commerce, at 8-15.

enterprise would imprudently blur this purposeful distinction." (*Id.* at 588-89)

Respondent argues that if wholly-owned affiliates are not covered by Section 1, it will be left with no remedy under Section 2. (Resp. Br. 56) But this is precisely what Congress intended by the "purposeful distinction" to which the Eighth Circuit refers. Respondent's argument that there is an inadequacy in Section 2 is better presented to Congress. As Professor Areeda has stated, if there is a "gap" in Section 2, "it should be addressed by reconsidering the rules governing unilateral behavior rather than by pretending that unilateral behavior is conspiratorial." (Areeda, *supra*, at 401)[8]

Respondent's plaint about "the inadequacy of state law" as a remedy is equally unpersuasive. (Resp. Br. 57) Respondent's state law claims have already resulted in a final award of approximately $2.5 million. This award has fully compensated respondent for *all the damage* it suffered from its temporary exclusion from the steel tubing market, which was also the *only* injury resulting from petitioners' asserted "conspiracy." (*See* Pet. Br. 7) While respondent objects that

[8] In contrast to the settled distinction between Sections 1 and 2, respondent argues for an internal bifurcation of Section 2 that makes no sense and is unsupported by the authorities it cites. Respondent asserts (Resp. Br. 53) that "autonomously operated parent and subsidiary corporations" were found guilty of conspiring to violate Section 2 in *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336 (D.D.C. 1981), whereas affiliates that were subject to "close articulation of control" were 'considered together, and the offense of monopolization" was found in *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd and remanded on other grounds*, 384 U.S. 563 (1966). But *Grinnell* was just as much a conspiracy to monopolize case as *AT&T*, and the differences in the exercise of control over the two sets of subsidiaries were inconsequential. The important point is that, in both cases, the parents and their subsidiaries were treated as unitary enterprises and judged by the more stringent standards of Section 2.

it will lose its treble damages, this again brings into focus the congressional scheme. Congress did not intend that ordinary business torts should give rise to treble damage relief, except where the basic plurality of actors for Section 1 liability is met, or the higher monopolization standards of Section 2 are satisfied.[9]

Respondent's reliance on other statutory provisions, such as Section 8 and Section 12 of the Clayton Act and Section 2(a) of the Robinson-Patman Act, ignores both the divergent policies they are intended to serve and the critical focus of Section 1 of the Sherman Act on "agreement."[10] As the

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[9] Respondent quotes *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 569 (1982), for the proposition that the Court "can honor the statutory purpose best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts ...." (Resp. Br. 57) The language omitted by the elipsis is crucial: "*absent indications that the antitrust laws are not intended to reach so far.*" (Emphasis added)

[10] Respondent's own principal authority regarding Section 8 of the Clayton Act, *In re Borg-Warner Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,049 (F.T.C. June 23, 1983), notes the peculiar statutory background and judicial interpretation of that section (*see, e.g.*, pp. 22,673-79; Bailey, concurring), and points out that "the criteria for deciding when a subsidiary's activities should be imputed to its parent corporation are based on the purpose of the law in question." (*Id.* at p. 22,663)

Respondent is on even weaker ground in citing to parent-subsidiary law under the venue provisions of Section 12 of the Clayton Act. (Resp. Br. 55 n.49) Summarizing the recent cases, Professor Blumberg states:

> "The existence of operational *ability* to influence [the subsidiary] is sufficient, and this may be demonstrated in significant part by the extent of the economic integration of the corporate components. Proof of *exercise* of the potential legal controls that exist in every parent-subsidiary relationship is not required." (Blumberg, *supra*, at 183; emphasis in original)

(footnote continued on next page)

Solicitor General stated: "the concept of 'agreement,' which is central to Section 1, has little meaning in the context of commonly owned and controlled corporations." (U.S. Br. 16)

D. A legal control rule would provide predictability for bench, bar and business.

Finally, an uncomplicated rule that parents and their wholly-owned affiliates are incapable of Section 1 conspiracy would end the current proliferation of confusing and conflicting standards. The truth is that, in over 35 years since *Yellow Cab*, the lower courts have struggled without success to resolve the intra-enterprise conspiracy dilemma. At least four divergent approaches have been articulated (Pet. Br. 32-41), and respondent now advances still another. We urge this Court to end this escalating disarray and adopt the test proposed by petitioners, which can be easily administered and is fully consistent with sound antitrust and economic principle.

(footnote continued from preceding page)

The four cases cited by respondent for an allegedly different rule under the Robinson-Patman Act (Resp. Br. 54 n.49) are effectively disposed of by the recent decision in *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979). The Fifth Circuit stated that it could find "no reported decision in which a Robinson-Patman Act damage award was actually sustained" on the basis of respondent's "control" test, and concluded: "[W]e deem it sensible to treat parent corporation and wholly-owned subsidiary corporation as a single economic unity. . . . The realistic effect on competition should control rather than esoteric and theoretical possibilities. . . ." (*Id.* at 966, 967)

Conclusion

The judgment should be reversed and the case remanded for entry of judgment in favor of petitioners on the antitrust issue.

Respectfully submitted,

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COPPERWELD CORPORATION, ET AL.,

PETITIONERS,

vs.

INDEPENDENCE TUBE CORPORATION,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether combinations between parent corporations and their autonomously operated subsidiaries which unreasonably restrain trade should be exempt from Section 1 of the Sherman Act.

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No. 82-1260

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION, ET AL.,

PETITIONERS,

vs.

INDEPENDENCE TUBE CORPORATION,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING RESPONDENT

I. INTRODUCTION

The States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Illinois, Iowa, Kansas, Ken-

tucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia respectfully submit this brief amici curiae pursuant to Supreme Court Rule 36.4.

II. IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of the antitrust laws of their respective states, and of the federal antitrust laws. In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as *parens patriae* on behalf of their natural citizens. (15 U.S.C. § 15(c)). The Corporation Counsel for the District of Columbia has similar enforcement responsibilities. (D.C. Code Ann. § 28-4507 (1981)).

B. Interest Of The Amici States In This Case

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and this Court's numerous pronouncements with respect thereto. Moreover, the states' antitrust laws are generally construed in accordance

with federal court decisions interpreting corresponding provisions of the federal laws.[1]

For these reasons and for the reasons more fully set forth herein the Amici States oppose the contentions of petitioners, the United States, and Amici supporting their position that anticompetitive contracts, combinations and conspiracies between parent and subsidiary corporations can never be violations of Section 1 of the Sherman Act. These contentions are antithetical to the interests of the Amici States in sound antitrust policy and effective enforcement of the antitrust laws.

III. SUMMARY OF ARGUMENT

The objectives of the Sherman Act, the clear holdings of this Court, and sound antitrust policy considerations mandate continued application of Section 1 of the Sherman Act to affiliated corporations.

1. This Court has always interpreted the Sherman Act in accordance with its basic objective of preserving competition. The Court has steadfastly condemned conduct which inhibits access to channels of commerce and prevents the emergence of new competition. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The anticompetitive effects which occurred in this case are clearly those which the Sherman Act was intended to interdict. In

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[1] *See, e.g., People v. North Avenue Furniture & Appliance, Inc.*, 645 P.2d 1291 (Colo. 1982); *Neyens v. Roth*, 326 N.W. 2d 294 (Iowa 1982); *Grams v. Boss*, 97 Wis.2d 332, 294 N.W.2d 473 (1980); *Marin County Bd. of Realtors, Inc., v. Palsson*, 130 Cal. Rptr. 1, 549 P.2d 833 (Cal. 1976); *State v. Readers Digest Assoc., Inc.*, 81 Wash.2d 259, 501 P.2d 290 (1972); *Pittsburg Plate Glass Co. v. Paine & Nixon Co.*, 234 N.W. 453 (Minn. 1931).

this case, there is compelling evidence of the intent of petitioners to foreclose entry of a new competitor which they feared would introduce vigorous price competition into the structural tubing market. There is no basis in law or economic theory for the Court now to deviate from the course so clearly delineated by the Sherman Act and consistently followed by this Court for nearly a century.

2. The Court has clearly and consistently ruled that parent and subsidiary conduct may be violative of the Sherman Act. The foundation of the Court's decisions is the basic purpose of the Sherman Act to preserve competition by prohibiting all forms of restraint which impede the free competitive process. In enacting the Sherman Act, Congress was concerned not with the form by which any particular restraint might be imposed but with the substantive effects of the restraint. Contrary to petitioner's argument that this Court's prior holdings elevate corporate form over substantive conspiracy concepts, the Court has utilized an unchanging analysis — the liability of affiliated corporations under Section 1 of the Sherman Act must always be based upon a determination of the practices challenged in light of the purpose of the Sherman Act. Corporate form is not a defense where the statute is otherwise transgressed. The new rule of law proposed by petitioners and the United States here would prohibit any consideration of the practices at issue and hold that all restraints of trade in which affiliated corporations engage, whether they are anticompetitive or not, would be exempt from the Sherman Act. Not only would such a result fly in the face of congressional intent, but it also would be contrary to sound antitrust policy.

3. The ability of enforcement authorities to apply the sanctions of Section 1 where affiliated corporations restrain the trade of third parties is of great importance to the State Attorneys General. The principles that have emerged from the decisions of this Court, as applied by the

lower courts, provide enforcement authorities with the ability to challenge the joint activities of affiliated corporations which result in demonstrably adverse effects on competition. At the same time, these principles insure that legitimate internal management decisions of affiliated corporations will not subject the corporations to Section 1 liability. Liability has been imposed only where the affiliated corporations in fact function as separate economic units *and* their joint conduct is directed at third parties. The Court's decisions do not discourage efforts to create legitimate efficiencies in organization, they discourage only anticompetitive conduct. Under the decisions of this Court, as applied by the lower courts, the choice of corporate organization would affect antitrust liability only where affiliated corporations act with the intention to exclude a competitor or otherwise restrain the trade of others. The decisions of the Court insure that Section 1 can be utilized to prohibit the joint activities of affiliated corporations where their activities have no legitimate business purpose, are designed to unreasonably restrain the trade of others and do in fact damage competition. This case represents a stark example of the type of conduct which should be prohibited by the antitrust laws — conduct undertaken for the specific purpose and having the desired effect of unreasonably restraining trade by excluding a significant competitor.

4. The rule proposed by petitioners and the United States would immunize otherwise unlawful conduct and impede enforcement of state and federal antitrust law. Petitioners' proposed rule places sole reliance on the percentage of stock ownership and prohibits any examination of economic distinctness, anticompetitive purpose or anticompetitive effect. Petitioners would thereby have the Court disregard the substance of their conduct and rely solely on the form by which a restraint was imposed. Any rule which would prohibit the application of Section 1 to the joint con-

duct of affiliated corporations solely on the basis of that affiliation, as proposed by petitioners, would insulate from antitrust liability the joint conduct of many thousands of subsidiaries and their parent or related corporations. Such a rule would seriously impair the ability of the Amici States to protect their citizens from the very anticompetitive conduct the Sherman Act was designed to prohibit. Further, antitrust statutes other than Section 1 are not adequate to deal with the unlawful and anticompetitive joint activities of affiliated corporations. Elimination of the remedies provided under the federal antitrust laws, including treble damages and the recovery of reasonable attorneys' fees, will severely inhibit private parties and state enforcement authorities from bringing suits against the perpetrators of such anticompetitive conduct.

5. Any change in the coverage of the Sherman Act should be made by Congress. This Court has always held that the doctrine of *stare decisis* is "a powerful force in our jurisprudence". *United States v. Maine*, 420 U.S. 515, 527 (1975). Moreover, as the Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation". The doctrine which petitioners and the government seek to overturn has been in effect ever since the Sherman Act was adopted, and Congress has made no effort to repeal the Court's holdings in the conspiracy area, thoug'ı Congress has amended the statute during that time in numerous other respects. The Court has frequently and consistently held that affiliated corporations are prohibited by the Sherman Act from combining to engage in such exclusionary alliances. In these circumstances, an overruling of all of the Court's earlier decisions would conflict with the legislative intent and seriously contravene the important doctrine of *stare decisis* so fundamentally embedded in our jurisprudence.

IV. ARGUMENT

THE OBJECTIVES OF THE SHERMAN ACT, THE CLEAR HOLDINGS OF THIS COURT, AND SOUND ANTITRUST POLICY CONSIDERATIONS MANDATE CONTINUED APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO AFFILIATED CORPORATIONS

A. The Purpose Of The Sherman Act Is To Preserve Competitive Freedom.

This Court has always held that the Sherman Act must be interpreted in accordance with its basic objective of preserving competition. Accordingly, the Court has been particularly concerned with the effect of the practices in issue upon competition and with the intent of the parties engaging in the challenged activities.

In this case, there is compelling evidence of the intent of petitioners to foreclose the entry of a new competitor which they feared would introduce vigorous price competition into the structural tubing market. Petitioners intimidated potential suppliers to refrain from dealing with respondent and thereby excluded respondent from the market for a substantial period. While petitioners contended that their purpose in making such contacts was to put persons on notice of their intention to protect "trade secrets", the district court concluded that there was considerable evidence that their true purpose was to "prevent or delay [Independence's] entry into the market", and the Court of Appeals characterized petitioners' contention as "specious". (Cert. App. B-25; A-27). The jury found that the exclusion of Independence resulted in a decrease in product supply and higher prevailing prices to consumers, and this finding was affirmed by the Court of Appeals. (Cert. App. A-21). This Court granted certiorari only on the narrow issue of

whether petitioners, parent and subsidiary corporations, constitute separate entities capable of combining with each other under the Sherman Act. Thus, at this point in the proceeding it must be taken as true that the petitioners acted to establish a group boycott with intent to destroy respondent and that such acts resulted in a substantial trade restraint in a relevant market to the injury of the competitive process and to the detriment of consumers.

The anticompetitive effects which occurred in this case are clearly those which the Sherman Act was intended to interdict. Therefore, the statute should apply in this case unless the specific language of the Sherman Act precludes such application. Clearly, it does not. This Court has consistently held that such anticompetitive practices of affiliated corporations are covered by the statute. The decisions of this Court are in conformance with the broad mandate of the statute to preclude all unreasonable restraints of trade by whatever form or means the parties have chosen to accomplish them.

This Court has always construed Section 1 of the Sherman Act to achieve this broad social and economic objective. Thus, in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958), the Court described the spirit and purpose of the Act in the following terms:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

The Court reiterated these objectives in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.

In this case petitioners acted to induce others to join a classic group boycott to deprive respondent of the "freedom to compete" by denying to it the economic tools to enter the business. It is difficult to imagine a situation which more closely corresponds to the concerns embodied in the Sherman Act and expressed in the Court's holdings.

This Court has always been vigilant in preserving the economic liberties so cogently articulated in these cases. It has steadfastly condemned conduct which inhibits access to channels of commerce and prevents the emergence of new competition. *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). There is no basis in law or economic theory for the Court now to veer from the course so clearly delineated by the statute and consistently followed for nearly a century.

B. The Court Has Clearly And Consistently Ruled That Parent And Subsidiary Conduct May Violate The Sherman Act.

In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), this Court held that "common ownership and control . . . are impotent to liberate the alleged combination and

conspiracy from the impact of the Act." *Id.* at 227. The Court has soundly reaffirmed that holding in each subsequent decision in which there was occasion to address the issue.

The foundation of the Court's decisions is the basic purpose of the Sherman Act to preserve competition by prohibiting all forms of restraint which unduly interfere with the free competitive process. The concern of Congress was not with the form by which any particular restraint might be imposed but with the substantive effects of the restraint. Thus, Congress adopted a broad prohibition against "[e]very contract, combination in the form of trust *or otherwise*, or conspiracy, in restraint of trade . . . ." 15 U.S.C. § 1 (emphasis added). This comprehensive prohibition conformed to the common law rule against such trade restraints. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Congress, "having employed a word that has a common-law meaning, should be presumed to have intended its common-law meaning unless it appears that such a construction is not in accord with the purposes of the statute." Note, *Developments in the Law of Conspiracy*, 72 Harv. L. Rev. 922, 1003 (1958). The statements of this Court in *Yellow Cab* are, therefore, a direct manifestation of legislative intent:

> The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.
>
> * * *
>
> The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. (332 U.S. at 227).

Petitioners criticize the Court's holdings as elevating corporate form over substantive conspiracy concepts. To the contrary, as the Court makes clear in *Yellow Cab*, the substance of the statutory concern is the existence of a trade restraint. The Court holds simply that corporate form is not a defense where the statute is otherwise transgressed.

The subsequent decisions of the Court have consistently adhered to these basic principles. Thus, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court held that conspiratorial enforcement of a resale price control scheme was not excused from Sherman Act coverage merely because of the common ownership of the conspirators. Such common ownership "does not liberate corporations from the impact of the antitrust laws." *Id.* at 215. Similarly, in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951), the Court held that a cartel arrangement to suppress all competition was clearly prohibited by Section 1 despite common ownership of the conspirators. *See also Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

The most recent decisions of the Court on this issue have further reinforced and illuminated the applicable principles. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the Court pointed out that where firms avail themselves of "the privilege of doing business through separate corporations" they cannot choose to reject the "obligations that the law imposes on separate entities." *Id.* at 141-142. In this regard, the Court has always held that corporate entities "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946). In the antitrust field, this formulation is particularly appropriate and was

applied again by the Court in *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975).

In *Citizens & Southern*, the Court specifically reaffirmed the holding of *Yellow Cab* that "corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *Id.* at 116. The Court went on to hold that, in the particular facts of that case, the objectives of the Sherman Act would not be achieved by finding a violation because the creation and operation of the corporations there involved resulted in the establishment of new competition. Contrary to petitioners' argument, *Citizens & Southern* does not represent any departure from the Court's previous holdings. Instead, it reaffirms the unchanging analysis — the liability of affiliated corporations under Section 1 of the Sherman Act must always be based upon a determination of the practices challenged in light of the purpose of the statute.

The new rule of law proposed by petitioners and the United States here would do quite the opposite. It would prohibit any consideration of the practices at issue and hold that all restraints of trade in which affiliated corporations engage, whether they are anticompetitive or not, would be exempt from the Sherman Act. Such a result would fly in the face of congressional intent and would be contrary to sound antitrust policy.

C. The Decisions Of This Court And The Lower Courts Provide Enforcement Authorities With The Ability To Prohibit Anticompetitive Conduct While Protecting The Legitimate Activities Of Affiliated Corporations.

The principles that have emerged from the decisions of this Court, as applied by the lower courts, provide enforcement authorities with the ability to challenge the joint

activities of affiliated corporations which result in demonstrably adverse effects on competition. At the same time, these principles insure that legitimate internal management decisions of affiliated corporations will not subject the corporations to Section 1 liability. Liability has been imposed only where the affiliated corporations in fact function as separate economic units *and* their joint conduct is directed at third parties.

As the United States concedes, economists recognize that subunits of a firm constitute separate economic units where they are autonomously operated. (U.S. Br. at 8 n.7). Thus, the courts examine the relationship between the affiliated corporations to determine whether they realistically constitute "separate units or one entity." *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). *See also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1054 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F.Supp. 841, 858-59 (N.D. Cal. 1979), *aff'd on other grounds sub nom., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

In the instant case, the Court of Appeals pointed out that the courts have developed a list of factors which resolves the issue of separateness based on "evidence that is empirical, readily furnished, and amenable to development at trial . . . ." (691 F.2d at 318; Cert. App. A-12). Indeed, the jury here was instructed that Regal had the capacity to conspire with Copperweld only if it were found to be "sufficiently distinct from Copperweld as an economic entity . . ." (691 F.2d at 319; Cert. App. A-14). The courts have adhered to this test and have dismissed Section 1 claims where the evidence did not clearly establish the existence

of separate economic entities. *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Las Vegas Sun, Inc., supra; Knutson, supra.*

The courts have recognized that when affiliated corporations constitute separate business units, a combination of their economic power to exclude competition raises substantial antitrust concerns. As the court noted in *Inglis, supra*, when a parent and subsidiary constitute separate economic units, the parent's capacity to "strengthen an anticompetitive assault perpetrated by that subsidiary, is of sufficient concern to antitrust policy" to warrant the applicability of Section 1. 668 F.2d at 1055.

Separate business units derive their separate economic leverage from their individual business relationships. Here, for example, the courts below found that Regal, operating in separate markets from Copperweld, developed its own set of suppliers and customers. As the Court of Appeals found, these separate business relationships gave petitioners "the ability . . . to bring pressure to bear on more people if they worked together than either could alone . . . ." (691 F.2d at 320; Cert. App. A-17).

Where such ability is used unreasonably to restrain the trade of third parties, Section 1 is properly applicable. The Attorney General's National Committee To Study the Antitrust Laws so concluded almost thirty years ago. The Committee's report noted that "when a parent and its subsidiary, though short of an attempt to monopolize, nonetheless plan to drive out a competitor, Section 1 may be transgressed." (*Report of The Attorney General's National Committee To Study The Antitrust Laws* 35 (1955)). The analysis of the *Attorney General's Report*, derived from this Court's holdings, has been consistently followed by the lower courts and has been approved by commentators. *See, e.g.*, J. Von Kalinowski, *Antitrust and Trade Regulation* § 6.01[2][c][i] 6-28 to 6-31 (1982); L. Sullivan, *Law of An-*

titrust 328 (1977); F. Easterbrook and R. Posner, *Antitrust Law* 730 (2d ed. 1981).

The restraint on third parties requirement insures that the conduct of legitimate business through separate but affiliated corporations will not unwittingly come within the reach of the antitrust laws. It also insures that businessmen will not be inhibited in choosing the most appropriate form of business organization. There is absolutely no basis for the assertion of the government and petitioners that the Court's decisions have inhibited the formation of corporate subsidiaries to achieve efficiencies. Under these decisions the choice of corporate organization would affect antitrust liability only where affiliated corporations act with the intention to exclude a competitor or otherwise restrain the trade of others. Where there is an anticompetitive purpose and effect, it is appropriate that antitrust policy deter such conduct. Thus, the Court's decisions do not discourage efforts to create legitimate efficiencies in organization, they discourage only anticompetitive conduct. Moreover, under the antitrust laws economic efficiency has never been considered paramount to the protection of competition. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 68-70 (1977) (White, J., concurring). Indeed, despite the assertions by present federal enforcement officials that "efficiency", as they would define it, is the sole concern of the antitrust laws, thoughtful commentators have vigorously asserted a variety of other goals. *See, e.g.*, Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 67 (1982).

The ability of enforcement authorities to apply the sanctions of Section 1 where affiliated corporations restrain the trade of third parties is of great importance to the State Attorneys General. There are many thousands of subsidiaries operating in every segment of the United States econ-

omy. P. Blumberg, *The Law of Corporate Groups* 463-74 (1983). It is obvious that the activities of subsidiaries have substantial impact on the residents of the fifty states and the District of Columbia.

The principles of the decisions of the Court, as applied by the lower courts, insure that Section 1 can be utilized to prohibit the joint activities of affiliate corporations where their activities have no legitimate business purpose, are designed to unreasonably restrain the trade of others, and do in fact damage competition. This case represents a stark example of the type of conduct which should be prohibited by the antitrust laws — conduct undertaken for the specific purpose and having the desired effect of unreasonably restraining trade by excluding a significant competitor.

D. The Rule Proposed By Petitioners And The United States Would Immunize Otherwise Unlawful Conduct And Impede Enforcement Of State And Federal Antitrust Law.

1. There is no Legal or Logical Basis for Overruling the Court's Previous Decisions.

The United States Justice Department and the Federal Trade Commission are charged with the responsibility of antitrust enforcement on the federal level. It is ironic, therefore, that a plea for retrenchment of antitrust principles should be supported by those agencies.

State enforcement authorities and private plaintiffs play an important and ever-increasing role in the overall national antitrust policy established by Congress. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572-73, n.10 (1982). The burden of antitrust enforcement has fallen more heavily upon the State Attorneys General in recent years, as antitrust enforcement at the federal level has de-emphasized more traditional anti-

trust enforcement actions.[2] This in itself presents increased antitrust enforcement responsibilities for the Amici States, but the United States now seeks to immunize an area of antitrust concern from all enforcement activities. It is one thing for the United States to exercise prosecutorial discretion by refraining from filing certain types of antitrust actions, but it is quite another to support the adoption of a new rule of law which would permanently remove the discretion of all government agencies and private parties to initiate actions to seek redress and to protect the public interest. *See* Litvak, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 Texas L. Rev. 649 (1982).

Such a rule is especially incongruous where, as in this instance, the existing statutory interpretation was established in large part through the prosecution efforts of the United States and had consistently been endorsed by United States Attorneys General in charge of the Antitrust Division until a few months ago. *See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955); Statement of Donald F. Turner, Assistant Attorney General Antitrust Division, 34 Antitrust L.J. 113, 123 (1967) (doctrine applies to "closely related corporations where the conduct involved is beyond defense and involves coercion of outsiders"); Letter of Richard W. McLaren to Board of Governors of the Federal Reserve System, *reprinted in*, 1983 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 50,122, p. 55,197 (Feb. 22, 1971) (policy to apply doctrine to challenge practices engaged in by commonly controlled firms which have "a coercive or restrictive effect on out-

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[2]*See Number of Private Actions Rises, As Number of Government Suits Falls*, ANTITRUST & TRADE REG. REP. (BNA) Vol.45, No. 1132, at p. 412 (September 22, 1983).

siders."); United States Department of Justice, Antitrust Guide for International Operations, 12 n.26 (1977) (doctrine applies to coercive attempts by members of a corporate group to drive third parties out of business or out of markets).

The United States neither acknowledges the consistent position which its antitrust division officials have taken on this issue in the past, nor does it attempt to explain why government enforcement policy should change so radically at this point in time. Neither the United States nor petitioners present any arguments which have not been made to this Court time and again in the past. They present no new data or economic research. Indeed, virtually every argument now presented may be found in the briefs opposing the United States presented to the Court in the prior cases involving this issue.

2. The Immunization of Parent-Subsidiary Combinations Would Hinder Antitrust Enforcement.

Any rule which would prohibit the application of Section 1 to the joint conduct of affiliated corporations solely on the basis of that affiliation, as proposed by petitioners, would insulate from antitrust liability the joint conduct of many thousands of subsidiaries and their parent or related corporations. Such a rule would seriously impair the ability of the Amici States to protect their citizens from the very anticompetitive conduct the Sherman Act was designed to prohibit.

Petitioners' proposed rule places sole reliance on the percentage of stock ownership and prohibits any examination of economic distinctness, anticompetitive purpose or anticompetitive effect. Petitioners would thereby have the Court disregard the substance of their conduct and rely

solely on the form by which a restraint was imposed. Commentators have recognized that such factors are "inconsequential in and of themselves." P. Blumberg, *supra* at 17-18. Further, petitioners' proposed "test" would ignore the conclusion of economists that separately operated, but affiliated, corporations are separate economic units. Petitioners also ignore the clear admonition of this Court that "[t]he corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act." *United States v. Yellow Cab Co.*, 332 U.S. at 227. Moreover, by failing to take into account the nature of the joint conduct involved, petitioners' rule runs directly counter to this Court's holding that "[t]he test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce." *Id.*

Perhaps the most eloquent evidence to support the necessity of the parent-subsidiary conspiracy concept is the case now before the Court. Here a parent and subsidiary corporation were able to pool their economic power to exclude a competitor, thereby damaging competition for a substantial period of time — a clear restraint of trade. But for application of Section 1 of the Sherman Act, such practices would not be prohibited by the antitrust laws; yet this is clearly the type of anticompetitive practice that gave rise to the Sherman Act in the first instance. Moreover, the commodity type products of the structural tubing industry are particularly susceptible to collusive pricing activities. *United States v. Berger Industries Inc.*, Crim. No. 79-278; Civ. No. 79-4567 (E.D. Pa. 1979) (price-fixing complaints in the electric weld steel tubing industry). The loss of price competition which might be introduced by new firms in such industries is therefore particularly meaningful to consumers.

There are an infinite number of ways by which "a parent and its subsidiary, though short of an attempt to monopolize, [may] nevertheless plan to drive out a compet-

itor . . ." or otherwise restrain the trade of strangers to the corporate family. *Report of the Attorney General's National Committee to Study the Antitrust Laws* 35 (1955). The antitrust laws should be concerned with such activities, and the petitioners and the United States concede as much when they suggest that antitrust statutes other than Section 1 might be invoked with respect to such behavior. (Pets. Br.45; U.S. Br. 27). As suggested by the Attorney General's Report, *supra*, however, other antitrust provisions are not adequate to deal with such anticompetitive behavior.

For example, as Section 2 of the Sherman Act has been interpreted by the courts, it may be invoked only where it can be proved that there is a substantial likelihood that the defendants will actually achieve monopoly. This requires a showing of substantial market shares. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969) (no Section 1 violation for lack of separate legal entities; no Section 2 violation for lack of sufficient market share). Section 2 does not address situations in which firms in different product markets are able to combine their commercial contacts to accomplish unreasonable trade restraints in one of those markets. Indeed, Section 2 was intended simply as an adjunct to Section 1, which was intended to reach all unreasonable trade restraints. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911). Congress intended to prohibit such predatory practices under Section 1 because those practices tend toward monoply. *Id.* This Court has recognized that Section 1 of the Sherman Act was designed to preserve the freedom of traders to buy and sell "in an open competitive market," and therefore:

> [T]he Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,' " whether "the tendency is a creeping one" or "one that proceeds at full gallop." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. at 213-214 (1959).

Since parent and subsidiary corporations have always been held capable of combining under Section 1, the courts have not been concerned with such activities in their interpretation of Section 2 of the Sherman Act. As a supplement to Section 1, that statute has been interpreted to prohibit exclusion of competitors only where defendant has a high market share. Petitioners and the United States now ask the Court to change only the Section 1 side of the Sherman Act equation without a corresponding change in Section 2. Not only would this be judicial legislation, it would also result in the virtual immunization of exclusionary practices by most parent-subsidiary combinations. Under this interpretation, "the Sherman Act would soon be emasculated; . . . it would not be the charter of freedom which its framers intended." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

Similarly, Section 7 of the Clayton Act is inadequate to deal with such practices. 15 U.S.C. § 18. Section 7 of the Clayton Act prohibits mergers and acquisitions which may lessen competition. That statute is not capable of anticipating all types of anticompetitive arrangements which might be undertaken in the future by affiliated firms. Moreover, the United States has reduced enforcement efforts in this area as well. *See, e.g.*, Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 Calif. L. Rev. 575 (1983).

Neither Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) nor state tort law are adequate remedies. The FTC has rarely used Section 5 to attempt to police restraints of the type at issue here, and neither the petitioners nor the United States has cited cases which suggest otherwise. Moreover, neither the State Attorneys General nor private parties may assert actions under that statute. Similarly, state tort law is not an adequate substitute for

Section 1 of the Sherman Act. Indeed, it was this inadequacy which caused the adoption of the Sherman Act. Moreover, tort laws do not pre-empt the Sherman Act. To the contrary, the Court has held that the antitrust laws are "at least as broad as a plaintiff's right to sue for analogous torts. . . ." *Hydrolevel, supra,* 456 U.S. at 569.

It should also be noted that state enforcement authorities do not have the authority to bring tort actions unless specifically authorized by statute. Even where such authority exists, however, reliance solely on such authority would seriously limit the ability of State Attorneys General to prohibit unreasonable restraints of trade by affiliated corporations. Not all conduct which results in a restraint of trade also happens to involve a tort. For example, the exclusion of a competitor will not necessarily involve the knowing interference with a contract. In the instant case, the jury found that Regal did not commit a tort even though it was an active participant in the scheme to eliminate Independence. Moreover, tort laws differ among the states. Conduct which may be a tort in one state may not be recognized as one in another state.

Finally, unlike state tort law, the federal antitrust laws provide for treble damages and the recovery of reasonable attorneys fees. Those remedies were provided to encourage private actions which this Court has recognized as "a bulwark of antitrust enforcement." *Perma Life Mufflers, Inc., supra,* 392 U.S. at 139. This Court noted that "the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id.* Treble damages and reasonable attorneys fees are awarded to encourage private actions and to insure that the remedy meaningfully counterbalances "the difficulty of maintaining a private suit" for violations of the Sherman Act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,*

429 U.S. 477, 486 n.10 (1977) (*quoting from* 21 Cong. Rec. 2456 (Statement of Sen. Sherman)).

Litigation of antitrust-type claims often can be enormously complex, time-consuming and costly. As in this case, the costs of prosecuting such claims can approach or exceed simple damages, even when they are substantial. (Cert. App. C-1). Without the availability of the remedies provided by the antitrust laws, private parties and state enforcement authorities will be severely inhibited by the high cost of litigation from bringing suits against the perpetrators of such anticompetitive conduct. A strong deterrent force against such conduct would be lost despite the clear intent of Congress that private suits constitute an important means of enforcing the antitrust laws. *Brunswick Corp.*, 429 U.S. at 486 n. 10 (*citing* 51 Cong. Rec. 16274-75 (Statement of Rep. Webb), 16317-19 (Statement of Rep. Floyd)).

F. Any Change In The Coverage Of The Sherman Act Must Be Made By Congress.

Petitioners and the United States request this Court to overrule all of its past decisions and to reduce the scope of Sherman Act coverage. Such action would collide with the doctrine of *stare decisis* and would be an impermissible invasion of the legislative function.

This Court has always held that the doctrine of *stare decisis* is "a powerful force in our jurisprudence." *United States v. Maine*, 420 U.S. 515, 527 (1975). Moreover, as the Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." The doctrine which petitioners and the government seek to overturn has been in effect ever since the Sherman Act was adopted, and Congress has made no effort to repeal the

Court's holdings in the conspiracy area, though Congress has amended the statute during that time in numerous other respects.

The role of the Court to interpret legislation, but not to legislate, is mandated by the Constitution and by practical considerations. The courts are simply not equipped to engage in a balancing of economic and social policy considerations as is the Congress. *Northwestern Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). As the Court stated in *United States v. Rutherford*, 442 U.S. 544, 555 (1979), "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy. . . ." *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 612 (1972) ("[T]o make the delicate judgment on the relative value to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.").

During the last two terms the Court has continued to reiterate its limited role in the antitrust field. Thus, in *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2478-79 (1982), the Court stated:

> By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application . . . we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute.

See also Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356 (1983); *BankAmerica v. United States*, 103 S.Ct. 2266 (1983).

This case presents a classic example of the type of anticompetitive trade restraints interfering with the right of citizens to engage in business that was of such concern

to Senator Sherman. (21 Cong. Rec. 2457, 51st Cong., 1st Sess. (1890)). The Court has frequently and consistently held that affiliated corporations are prohibited by the Sherman Act from combining to engage in such exclusionary alliances. In these circumstances, an overruling of all of the Court's earlier decisions would conflict with the legislative intent and seriously contravene the important doctrine of *stare decisis* so fundamentally embedded in our jurisprudence.

V. CONCLUSION

For the foregoing reasons the Amici States respectfully submit that the decision below should be affirmed.

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Supreme Court of the United States
OCTOBER TERM, 1982

COPPERWELD CORPORATION, *et al.*,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE CANADIAN MANUFACTURERS ASSOCIATION AND THE CANADIAN CHAMBER OF COMMERCE AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of the Sherman Act?

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BRIEF OF THE CANADIAN MANUFACTURERS ASSOCIATION AND THE CANADIAN CHAMBER OF COMMERCE AS AMICI CURIAE SUPPORTING PETITIONERS

The Canadian Manufacturers Association and The Canadian Chamber of Commerce submit this brief as *amici curiae* in support of the petitioners.

INTEREST OF AMICI CURIAE

The Canadian Manufacturers Association ("CMA") is the oldest and largest trade association of manufacturers in Canada. Its more than 3,500 members comprise companies situated across Canada in all sectors of industry, and together produce about seventy-five percent of all goods made in Canada. The CMA provides informational services to its members to improve their competitiveness and acts as a spokesman for manufacturers to all levels of government in Canada.

The Canadian Chamber of Commerce is the largest organization of businesses in Canada and includes among its membership companies of all sizes located throughout the country. Its approximately 145,000 members are believed to constitute nearly half of all incorporated businesses in Canada.

Many of the members of the Canadian Manufacturers Association and the Canadian Chamber of Commerce are affiliated by ownership with corporations located in the United States.

The Court is asked to determine in this case the circumstances, if any, in which corporations affiliated by a common ownership can be considered capable of engaging in a Sherman Act conspiracy under the "intraenterprise conspiracy" doctrine. Although *amici* and their members have no direct interest in the outcome of this case involving a U.S. corporation and its wholly-owned domestic subsidiary, the Court's decision here could affect substantially the business relationships between Canadian corporations and their affiliates in the United States, as well as the trade relations between the governments of Canada and the United States. Canadian-United States trade is of tremendous importance to both countries: two-way trade between Canada and the United States exceeded $85 billion (U.S.) in 1982,[1] and each country is the other's largest export market.[2] For these reasons,

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[1] Government of Canada, Statistics Canada Daily, July 12, 1983, at 3.

[2] In 1981, approximately seventy percent of all Canadian exports were to the United States, while twenty percent of all U.S. exports were to Canada. United States exports to Canada were more than twice as large as U.S. exports to Japan, the next largest U.S. export market, and were nearly as large as U.S. exports to the entire European Economic Community. Address by the Hon. Allan E. Gottlieb, Canadian Ambassador to the United States, at the American Association of Exporters and Importers' Seminar on Exporting to Canada (Jan. 28, 1982).

the Court's judgment in this case should be informed by the special considerations applicable to the relationships between affiliated companies based in the two countries, particularly in terms of the policies of the Canadian government with respect to foreign investment in Canada.[a]

SUMMARY OF THE CASE

Petitioners, a U.S. corporation and its wholly-owned domestic subsidiary, seek reversal of an antitrust judgment that was entered against them solely on the basis that their joint activities constituted a conspiracy in violation of the Sherman Act. They urge the Court to adopt a rule that a parent company and its wholly-owned subsidiary are not separate entities legally capable of engaging in concerted action with each other within the meaning of that statute.

The United States supports petitioners' argument that the intraenterprise doctrine advances no economic or antitrust-related interest and improperly blurs the Sherman Act's different standards for unilateral and multiparty conduct. The United States argues that the relevant inquiry in determining whether affiliated companies are capable or incapable of conspiring with each other is one of control, and that where one related company controls the other, or where they are commonly controlled, they should be considered a single entity incapable of conspiring in violation of the antitrust laws. The United States suggests that control should be presumed where there is majority stock ownership.

Respondent, for its part, concedes that separate incorporation alone is insufficient to support a conclusion

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[a] Our interest and the focus of discussion in this brief relate to Canadian policies concerning foreign investment. As noted below, however, many other countries also impose various similar obligations. To that extent, our discussion applies as well to the relationships between United States firms and affiliated firms in countries other than Canada.

that affiliated companies are legally capable of conspiring with each other. It argues instead that such a conclusion should be permitted in some circumstances under a rule dependent, in the first instance, on a determination that the affiliated corporations are to some undefined degree sufficiently "independent" in their methods of operation that the fact of their affiliation should be ignored.

The court of appeals in this case applied such a rule and approved the district court's jury instruction that petitioners should be found to have the legal capacity to conspire if they "operated as separate entities." (Pet. App. A 40.) The instruction mentioned nine factors as relevant to this question and also permitted the jury to consider "any other facts you [the jury] find that are relevant . . . ."[4] (Pet. App. A 41.) Other courts have mentioned different factors or groups of factors as relevant to determining the "separateness" of affiliated corporations.[5] No court, however, has provided any framework within which the relative significance of these factors should be determined or any analysis of their significance to economic or antitrust concerns.

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[4] The specified factors included "[w]hether the two companies are run by separate management staffs"; "[w]hether the two companies maintained separate corporate officers"; "[t]he degree to which the subsidiary sets its own policies regarding sales, engineering, production, purchasing, negotiation of the labor agreements, and other aspects of its business" in terms of both "day-to-day operating decisions and the major or executive policy decisions"; "[w]hether the two companies maintained separate bank accounts, separate records, and separate facilities, including such things as pension plans"; and "[w]hether both companies have common officers or directors," although "[t]he existence of some common officers or directors does not alone render the two companies incapable of conspiracy." (Pet. App. A 40-41.)

[5] *See, e.g., Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 802 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

SUMMARY OF ARGUMENT

In deciding this case, the Court should consider the consequences of any rule it might fashion on the very substantial trade between Canada and the United States. Canadian law, like the law of many countries, significantly and legitimately influences the nature, extent, and business structure of local investment by foreign interests. One of the purposes of the Canadian law is to encourage and require Canadian interests to participate in various aspects of the control of Canadian assets and businesses. Under the rule of law applied by the lower courts in this case, promoting such participation, and various indicia thereof, could place Canadian firms and their U.S. affiliates in the position of being deemed capable of conspiring in violation of U.S. antitrust law by the mere fact that such firms complied with Canadian law or policy within Canada. Such unthinking application of U.S. antitrust law to the relations between U.S. firms and their Canadian affiliates could threaten the viability of those relations, the trade they promote, and, more broadly, relations between the United States and Canada.

Especially in the case of foreign subsidiaries, the Court should hold that business enterprises under common control are incapable as a matter of law of conspiring in violation of the Sherman Act. As the U.S. Department of Justice has suggested, "control" for purposes of this determination should be conclusively presumed where the voting stock ownership exceeds fifty percent, irrespective of various indicia of separateness or independence that might otherwise exist.

Any rule of general applicability adopted by the Court should also take into account that there are many instances in which, pursuant to Canadian law and policy, a U.S. firm may share control with a Canadian affiliate over their common Canadian interests, with neither being

wholly-owned (or even majority-owned) by the other. These affiliates may also have several indicia of separateness or independence. In such circumstances, lower courts nonetheless should be permitted to consider, *inter alia*, the extent to which the "parent" firm may exercise effective control over various competitive aspects of the business of the common enterprise, in particular those aspects of the business affecting U.S. commerce. The fact that the U.S. firm and its Canadian affiliate may share control over the Canadian aspects of their business, in accordance with Canadian law and policy, should not be a sufficient basis for concluding that they have the capacity to conspire in violation of U.S. antitrust law.

It is in the clear interest of U.S. firms, and of the U.S. economy generally, that such firms be permitted to do business abroad as well as within the United States. Operating in foreign countries, often through foreign subsidiaries or affiliates, these firms must comply with the laws of the countries in which they do business. They should not be penalized under U.S. antitrust law for such compliance. Both the amount of trade and policy considerations involved are probably greatest in the case of Canada, the United States' close neighbor and largest trading partner.

ARGUMENT

I. CORPORATIONS UNDER COMMON CONTROL SHOULD BE CONSIDERED INCAPABLE OF CONSPIRING WITH EACH OTHER IN VIOLATION OF THE SHERMAN ACT

The intraenterprise conspiracy doctrine generally is recognized to have originated in this Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). In the thirty-five years since *Yellow Cab*, it has been the subject of extensive litigation and scores of reported opinions. No court, however, has articulated a logical or economic reason for a rule that two companies under common control should be considered capable of conspiring with each other within the meaning of the Sherman Act. In fact, courts have acknowledged that affiliated companies choose to be separately incorporated for entirely legitimate reasons unrelated to any competition or antitrust concerns.[6] Moreover, it is established law under the Sherman Act that unincorporated divisions of the same company are legally incapable of conspiring with each other, even though the management and operation of each division may be indistinguishable from that of a separately incorporated subsidiary.[7] In effect, overriding importance has been attached to the formality of separate incorporation, contrary to this Court's admonition in *Yellow Cab* that "substance rather than form" must be the controlling consideration. (332 U.S. at 227.)

Although the court of appeals correctly recognized that the mere fact of separate incorporation should not be

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[6] *See, e.g., Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589-90 (8th Cir. 1981); *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868, 873 (S.D.N.Y. 1973).

[7] *See, e.g., H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

given any significant weight, its alternative "standard" is equally inappropriate as a means of ensuring that substance, not form, dictates the result. As petitioners and the *amici* supporting them on the petition for *certiorari* have demonstrated, the "separateness" or independence of operation of commonly controlled corporations is no more indicative of any need or justification for antitrust scrutiny of the relationships between them than is the fact of their separate incorporation. While we agree with petitioners that the court of appeals' analysis is inappropriate under any circumstances, its artificiality becomes particularly clear as applied to affiliated companies doing business in different countries.

Without question, there are legitimate reasons for a company seeking to do business in another country to do so through a separately incorporated subsidiary.[8] But, business, tax, and other economic considerations that make separate incorporation convenient or advantageous when both companies do business in the same country frequently are of overriding importance when operations in different countries are involved. Such companies necessarily operate in very different business and legal environments and, business considerations aside, the need to comply with disparate regulatory systems as a practical matter may dictate separate incorporation.[9] Similarly, relatively independent management of such companies in recognition of the differing circumstances fac-

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[8] As the Department of Justice recently acknowledged, there are "perfectly legitimate reasons why a domestic [U.S.] corporation might wish to operate overseas through separately incorporated subsidiaries rather than through divisions. The use of subsidiaries may offer personnel, management, political and financial or tax advantages." Memorandum of the United States in Response to Motion of the Timken Company to Terminate the Final Judgment, at 7-8 (May 20, 1983), *United States v. Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

[9] McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 186 (1955).

ing them hardly can be considered surprising or a matter of antitrust concern.[10]

Moreover, in Canada, as in many other countries,[11] government policy concerning foreign investment directly and substantially affects the structure and management of affiliated corporations. The most significant of the various statutory and regulatory requirements implementing this policy in Canada is the Foreign Investment Review Act ("FIRA" or "the Act"),[12] which in general requires notification and government approval of both the establishment of new businesses and the acquisition of existing businesses in Canada by non-Canadians.[13]

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[10] *See generally* R. Berenbeim, Operating Foreign Subsidiaries: How Independent Can They Be? (The Conference Board, Report No. 836, 1983).

[11] *See, e.g.*, Price Waterhouse & Co., Investment Policies in Seventy-three Countries: Second Annual Survey (1982) (58 of 73 countries surveyed imposed some form of ownership restrictions). Mexico, for example, imposes numerous restrictions on U.S. and other non-Mexican interests doing business there. Certain commercial activities are reserved to the state, other activities are reserved to Mexican citizens and Mexican companies having charters excluding foreign participation, and other activities may permit foreign capital participation up to specified minority percentages. Foreign investment capital may not exceed forty-nine percent except as permitted in special circumstances by the National Commission on Foreign Investment. Law to Promote Mexican Investment and to Regulate Foreign Investment, D.O. Mar. 9, 1973, *reprinted in translation in* Multinational Corporation Law: Mexico, Central America, Panama and the Central American Common Market § B.2a, at 1 (M. Gordon ed. 1983).

The United States similarly imposes various restrictions and requirements on certain types of foreign investment in the United States. *See, e.g.*, American Bar Ass'n, A Guide to Foreign Investment Under United States Law (1979).

[12] Stat. Can. 1973-74, ch. 46, as amended by Stat. Can. 1976-77, ch. 52 and Stat. Can. 1980-81-82, ch. 107.

[13] This statement of the scope of FIRA's coverage is imprecise in a number of respects not material for present purposes. For a discussion of FIRA's coverage provisions, *see, e.g.*, Brown, *Foreign Investment Controls in Canada and Australia* in Inter-

Under FIRA, non-Canadians are permitted to establish new businesses in Canada or acquire existing Canadian businesses only when the government determines that such action "is or is likely to be of significant benefit to Canada."[14] In making this determination, the Foreign Investment Review Agency and ultimately the Canadian Cabinet[15] are required to consider five factors prescribed by the Act: (1) the effect of the proposed transaction on the level and nature of economic activity in Canada, including employment, resource processing, utilization of Canadian goods and services, and Canadian exports; (2) the "degree and significance of participation by Canadians" in the business in question and in the relevant industry in Canada; (3) the effect of the proposed transaction on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada; (4) the compatibility of the proposed transaction with Canadian industrial and economic policies and the policies of the governments of those provinces likely to be significantly affected by it; and (5) the effect of the proposed transaction on competition in Canada.[16]

In practice, applicants seeking approval under FIRA frequently must enter into legally binding undertakings

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national Antitrust: Fifth Annual Fordham Corporate Law Institute 436, 452-63 (B. Hawk ed. 1979); Note, *Canada's Foreign Investment Review Act Revisited*, 4 Fordham Int'l L.J. 175, 181-87 (1981).

[14] FIRA § 2(1).

[15] For a discussion of the review process, *see, e.g.*, Tennier, *Some Practical Advice on Canada's Foreign Investment Review Process*, Foreign Investment Rev., Spring 1981, at 8; Beck, *Law and Policy in the Operation of Canada's Foreign Investment Review Agency*, 45 Sask. L. Rev. 183, 189-92 (1981).

[16] FIRA § 2(2). Under Canadian competition law, affiliated corporations are exempt from coverage under provisions relating to "conspiracy-type" offenses. *See* Combines Investigation Act, Can. Rev. Stat. ch. C-23 (1970), as amended by Stat. Can. 1974-75-76, ch. 76 and Stat. Can. 1977, ch. 28, §§ 31.4(4)-(6), 32(7), 32.2(3), 38(2), 38(7)-(7.1).

concerning the ownership, management and operations of the Canadian business to be established or acquired. Although only limited information concerning specific undertakings is publicly available,[17] they have included commitments concerning: the proportion of Canadians among the directors, officers and other management employees of the Canadian business[18] and the extent of the responsibility of Canadian management for its operations;[19] em-

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[17] The Review Agency interprets the Act to prohibit disclosure of such information absent the permission of the parties involved. *E.g.*, Foreign Investment Review Act Annual Report 1981-82, at 3 (1982) ("FIRA Annual Report 1981-82"). The Review Agency publishes information concerning undertakings entered into in selected specific transactions with the permission of the parties, *see, e.g., id.* at 3-4, and for each allowed transaction provides a rather general categorization of the respects in which it was found to be of likely significant benefit to Canada. *See, e.g., id.* at 31-71.

[18] *See, e.g.*, FIRA Annual Report 1981-82, at 3 (applicant undertook that at least two-thirds of the directors of acquired business would be Canadians); FIRA Annual Report 1980-81, at 4 (applicant undertook that at least two-thirds of the directors and a majority of the officers of newly established business would be Canadians); FIRA Annual Report 1978-79 (Supp.), at 12-13.

Apart from FIRA, Canadian-chartered corporations frequently are required to have a majority of Canadian directors. For example, the Canada Business Corporation Act ("CBCA"), Stat. Can. 1974-75-76, ch. 33, the Canadian federal statute under which most large Canadian corporations are chartered, requires that a majority of the directors be resident Canadians, CBCA § 100(3), and ordinarily permits the board of directors to act only when a majority of the directors present at a meeting of the board are resident Canadians. CBCA § 109(3)-(4). Committees of the board similarly are required to have a majority of Canadian members. CBCA § 110(2). Alternatively, the directors may appoint a managing director to exercise most powers of the board, but only if the managing director is a resident Canadian. CBCA § 110(1). The corporation laws of a number of Canadian provinces also contain provisions requiring that a majority of the directors be Canadian. *See* FIRA Annual Report 1978-79 (Supp.), at 12. FIRA undertakings concerning the composition of the directors usually have involved commitments beyond those imposed by the relevant chartering statute. *Id.*

[19] *See, e.g.*, FIRA Annual Report 1981-82, at 3 (applicant undertook to allow Canadian management freedom to manage the day-to-

ployment of other Canadian personnel;[20] further investments in the Canadian business;[21] export commitments,[22] including the assignment to the Canadian business of exclusive rights to export to certain countries or to market certain products worldwide;[23] the processing of raw materials in Canada;[24] the use of Canadian raw materials and supplies where available on terms competitive with imports;[25] and the funding and operation of research and development in Canada,[26] including in some instances commitments that "the Canadian subsidiary [will be given] exclusive corporate responsibility for research, development, manufacturing and worldwide marketing of specific products, groups of products, or product lines."[27] FIRA undertakings also have included commitments to permit Canadians to participate in the ownership of the Canadian business through public offerings

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day operations of the new business); FIRA Annual Report 1980-81, at 5 (applicants undertook that board of directors of bulk commodities handling terminal to be acquired would have autonomy to consider and deal in good faith with all offers by potential terminal users).

[20] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.), at 2-3.

[21] *See, e.g.*, FIRA Annual Report 1981-82, at 3-4; FIRA Annual Report 1980-81, at 5; FIRA Annual Report 1979-80, at 5; FIRA Annual Report 1978-79 (Supp.), at 5.

[22] *See, e.g.*, FIRA Annual Report 1981-82, at 4; FIRA Annual Report 1979-80, at 5, 6; FIRA Annual Report 1978-79 (Supp.), at 5-7.

[23] FIRA Annual Report 1978-79 (Supp.), at 6.

[24] *See, e.g.*, FIRA Annual Report 1978-79 (Supp.), at 7-8.

[25] *See, e.g.*, FIRA Annual Report 1980-81, at 5; FIRA Annual Report 1978-79 (Supp.), at 8-9.

[26] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.), at 13-14.

[27] FIRA Annual Report 1978-79 (Supp.), at 14.

or private placements of shares [28] or the participation of Canadian joint venture partners.[29] While FIRA undertakings typically relate to the operation of the particular Canadian business to be established or acquired, where the applicant has other Canadian businesses or is a Canadian subsidiary of a non-Canadian company, undertakings concerning those businesses have been necessary in some cases.[30]

In short, Canadian government policy as implemented through FIRA substantially affects the nature of the relationships between Canadian companies and their affiliates in the United States, and, in some cases, effectively requires that there be a degree of independence in their management. Under these circumstances, considerations of international comity alone must weigh heavily against any rule that subjects those relationships to scrutiny under U.S. antitrust law. Even apart from such considerations, however, there is no principled basis on which to subject those relationships to even the possibility of enhanced risk under U.S. antitrust law.[31] This Court previously has recognized the inappropriateness of indis-

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[28] *See, e.g.*, FIRA Annual Report 1980-81, at 4; FIRA Annual Report 1979-80, at 4, 6; FIRA Annual Report 1978-79 (Supp.), at 10-12.

[29] *See, e.g.*, FIRA Annual Report 1981-82, at 3; FIRA Annual Report 1978-79 (Supp.) at 12.

[30] *See, e.g.*, FIRA Annual Report 1978-79, at 12; FIRA Annual Report 1977-78, at 15.

[31] We do not address here any questions concerning the competitive effect of the creation of the inter-corporate relationship in the first instance. As the United States pointed out in its brief in support of the petition, remedies against acquisition posing significant threats to competition are available under statutes other than the Sherman Act. Moreover, a corporate affiliation created in furtherance of a pre-existing concert of action may violate the Sherman Act without regard to any rule of intraenterprise conspiracy. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

criminate application of the intraenterprise doctrine to commercial practices dictated, as a practical matter, by government regulation. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 111-20 (1975). Moreover, application of the court of appeals' analysis to such relationships, far from serving any interest relevant to U.S. antitrust enforcement, simply demonstrates the artificiality of the "separateness" standard it applied. Where corporations are under common control, the competitive significance of normal cooperation and interaction between them does not change simply because they have separate managers, headquarters or bank accounts. Yet, under the court of appeals' decision in this case, the economic reality of common control is simply ignored and such formal matters as these are given determinative effect.

Permitting scrutiny of relationships between affiliated companies under provisions of U.S. antitrust law designed to regulate concerted behavior between wholly independent economic entities disserves the interests of both the United States and Canada. While the Canadian government has determined in the exercise of its sovereignty that limiting conditions should be attached to non-Canadians' ability to do business in Canada, both Canada and the United States benefit by economic interaction between the two countries.[22] Legal rules, like the intraenterprise conspiracy doctrine, that enhance either the actual or perceived risk of trade between the two can

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[22] Recognizing the benefits of trade between the two countries, Canada and the United States in 1965 signed the Agreement Concerning Automotive Products between the Government of the United States and the Government of Canada, 17 U.S.T. 1372, T.I.A.S. No. 6093 (implemented by the Automotive Products Trade Act of 1965, 19 U.S.C. § 2001, *et seq.* (1976)), allowing the efficient rationalization and allocation of production facilities between Canadian and American affiliated companies. *See, e.g.*, H. Helmers, The United States-Canadian Automobile Agreement: A Study in Industry Adjustment (1967).

only act as a deterrent to investments and business ventures beneficial to both.

This deterrent effect is particularly acute because plaintiffs in private litigation involving the intraenterprise doctrine frequently have attempted to characterize normal interaction among affiliated corporations as "price fixing" or a "concerted refusal to deal" subject to rules of *per se* illegality.[33] Such claims have been rejected on various grounds in a number of cases,[34] and the Department of Justice has made clear its rejection of such arguments.[35] Nevertheless, the possibility, however remote, that normal inter-corporate dealings between affiliated corporations will be considered a *per se* violation of U.S. antitrust law—without possibility of explanation or justification—must deter businessmen from making the substantial investments required in furtherance of Canadian-United States trade.[36]

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[33] *See, e.g., Reisner v. General Motors Corp.*, 511 F. Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir.), *cert. denied*, 103 S. Ct. 130 (1982) (plaintiff claimed that refusal of General Motors and its German subsidiary to sell automobile engines to plaintiff was a group boycott unlawful *per se* under Section 1 of the Sherman Act).

[34] *Id.* at 1173; *Thomsen v. Western Elec. Co.*, 512 F. Supp. 128, 131 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd on other grounds sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *du Pont Glore Forgan, Inc. v. American Tel. & Tel. Co.*, 437 F. Supp. 1104 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Media Networks, Inc. v. American Tel. & Tel. Co.*, 1976-1 Trade Cas. (CCH) ¶ 60,780 (D. Minn. 1976); *Chastain v. American Tel. & Tel. Co.*, 401 F. Supp. 151, 160 (D.D.C. 1975).

[35] *See* U.S. Department of Justice, Antitrust Guide for International Operations 12 (1977) (parent corporation may allocate territories or set prices for subsidiaries it controls).

[36] While we believe that any scrutiny of such conduct based on the intraenterprise doctrine is both unnecessary and counterproductive, at a minimum this Court should make clear that *per se*

The Court should make clear that corporations under common control cannot be found to have conspired among themselves in violation of the Sherman Act.

II. MAJORITY OWNERSHIP SHOULD BE PRESUMED TO CONSTITUTE CONTROL

The fact of common control is an economic reality that should be determinative of the legal status of relationships between affiliated corporations. While control may well be conferred by a minority ownership interest,[37] we agree with the United States that it would be appropriate for the Court to adopt a conclusive presumption that sufficient control exists in any circumstances where one corporation has a majority ownership interest in another.

A rule treating majority ownership on the same basis as complete ownership would be fully consonant with decisions under the intraenterprise doctrine and with the enforcement policies of the Department of Justice. In *Sunkist Growers, Inc. v. Winkler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), this Court held that affiliated legal entities (growers' associations) could not "be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act." *Id.* at 27. The Court reached this conclusion even though the members of two of the organizations involved (comparable to the shareholders of a corporation) were not identical. Several other courts similarly have treated majority-owned corporations on the same basis as wholly-owned subsidiaries.[38] Guidelines issued by the Depart-

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rules have no application to the relationships between affiliated companies.

[37] *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (23-38 percent stock ownership was found to confer "control"). *See also* Part III, *infra*.

[38] *See Thomsen v. Western Elec. Co.*, 512 F. Supp. 128 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982) (summary judgment granted to defendants over contention that parent corporation, its wholly-owned subsidiary and a company 90 percent owned by the parent had conspired in violation of

ment of Justice in 1977 likewise provide that majority ownership should be considered equivalent to total ownership for purposes of analysis under the intraenterprise doctrine.[39]

Such a rule would be particularly appropriate with regard to the relationships between affiliated Canadian and United States corporations under the auspices of FIRA. As discussed above, undertakings to make substantial equity participation in Canadian businesses available to Canadian investors frequently are necessary to obtain approval under FIRA. The existence of such Canadian minority ownership does not alter the fundamental nature of the intercorporate relationship or provide any reason for enhanced competitive concerns. The effect of applying a more stringent standard where companies are affiliated by majority, rather than complete, ownership would be to deter beneficial investments and relationships without promoting any antitrust-related goal.

III. ANY RULE ARTICULATED BY THE COURT SHOULD TAKE INTO ACCOUNT THE SPECIAL NATURE OF THE RELATIONSHIPS BETWEEN U.S. FIRMS AND THEIR CANADIAN OR OTHER FOREIGN AFFILIATES

Even where a U.S. firm owns less than a majority interest in a Canadian affiliate, there should not necessarily be any presumption that the firms have the ca-

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the Sherman Act); *In re Penn Central Securities Litigation*, 367 F. Supp. 1158 (E.D. Pa. 1973) (summary judgment granted to defendants over contention that companies owned 99 percent, 80 percent and 51 percent by common parent had conspired in violation of the Sherman Act).

[39] U.S. Department of Justice, Antitrust Guide for International Operations 12-13 (1977). The Department has recently reaffirmed this position. *See* Memorandum of the United States in Response to the Motion of the Timken Company to Terminate the Final Judgment, at 8 (May 20, 1983), *United States v. Timken Roller Bearing Co.*, No. 24214 (N.D. Ohio).

pacity to conspire in violation of the Sherman Act. As this Court has previously held, even a relatively small ownership interest can confer certain types of control for purposes of U.S. antitrust law.[40]

Nor should the fact that a Canadian affiliate enjoys a significant measure of control over the Canadian aspects of its business—a result required by Canadian law and policy—lead necessarily to the conclusion that the firms have the requisite capacity to conspire. Rather, the lower courts should be permitted to inquire into the U.S. firm's control over those aspects of the enterprise's business distinctly affecting U.S. commerce (that is, over the U.S. aspects of the enterprise's business). Where such control is found, the firms ought not be deemed capable of conspiring under the Sherman Act.

Such an approach would generally harmonize U.S. antitrust law and Canadian law governing foreign investment so that compliance with both could be achieved and trade between the two countries thereby promoted. Failure to accommodate such a flexible approach could result in unwarranted application of U.S. antitrust law at the expense of Canadian and other foreign law aimed at establishing a measure of local control over the indigenous affairs of foreign national businesses. Such an approach would also properly recognize that Canadian companies in which U.S. firms have a not-insubstantial minority ownership have a legitimate business interest in supporting and being supported by their U.S. affiliate. Were such firms subjected to or threatened with substantial penalties for a failure affirmatively to compete, the business purpose of having minority-owned foreign affiliates[41] would become significantly diminished and

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[40] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

[41] As indicated above, several countries, including Canada and Mexico, encourage or require minority ownership by foreign firms, including U.S. firms. *See* n.11, *supra*.

much existing trade between Canada and the United States would be threatened.

CONCLUSION

The intraenterprise conspiracy doctrine as now formulated lacks any economic or antitrust-related foundation; it focuses on matters of form, not substance; and it inappropriately fails to take into account either the fact of common control, shared control, or other special control circumstances unique to the relationships between U.S. firms and foreign affiliates, especially where the U.S. firm's control over the foreign firm is limited in various ways by foreign law.

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No. 82-1260

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Petitioners,
v.
INDEPENDENCE TUBE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a parent corporation and its wholly-owned subsidiary are capable of conspiring together in violation of Section 1 of the Sherman Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1260

COPPERWELD CORPORATION and REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONERS

This brief is filed on behalf of the Chamber of Commerce of the United States and the National Association of Manufacturers in support of the petitioners. Consent to file this brief has been obtained from counsel for all parties and has been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States (the "Chamber"), a non-profit membership organization, is the nation's largest federation of corporations, trade associations, chambers of commerce, and business and professional persons, with an aggregate membership exceeding 209,000. The Chamber's membership reflects the diversity of the nation's business and professional life and includes corporations of all sizes and types. One of the

Chamber's principal functions is to present its members' views to the federal courts on issues of concern to the business community, and it has previously appeared before this Court as amicus curiae to address questions arising under the antitrust laws. *See, e.g., United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978); *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975).

The National Association of Manufacturers (the "NAM") is a non-profit voluntary business association incorporated under the laws of the State of New York representing more than 13,000 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. In addition, through its Associations Department and the National Industrial Council, the NAM is affiliated with approximately 158,000 businesses.

The intra-enterprise conspiracy doctrine at issue in this case is a matter of particular concern to a broad range of the Chamber's and the NAM's membership and to the American business community generally, because the doctrine severely penalizes the use of a form of internal business organization that has important benefits for many business enterprises.

SUMMARY OF ARGUMENT

The question the Court has agreed to review in this case is the proper legal standard to be applied in determining whether a corporation violates Section 1 of the Sherman Act by "combining or conspiring" with its wholly-owned subsidiary. As a general rule, the Chamber and the NAM submit, the proper standard is that there can be no such conspiracy under Section 1 between constituent parts of a business enterprise. To impose antitrust liability on "combinations" between entities that are already economically combined severely penalizes the

choice of a widely-used form of internal organization with important business advantages that do not ordinarily implicate substantive antitrust concerns. This penalty on the use of separately incorporated divisions or subsidiaries is not justified by anything in the policy or objectives of the antitrust laws.

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Unreasonably Distorts Decisions Regarding Internal Corporate Organization That Do Not Raise Antitrust Concerns.

Section 1 of the Sherman Act applies only to combinations and conspiracies in restraint of trade. 15 U.S.C. § 1. It requires concerted action among a plurality of actors. It cannot be violated by unilateral conduct.

As a result, it is well-established that no action taken by a single corporation, acting alone, gives rise to liability under Section 1. This is so whether the corporation has a highly integrated decision-making structure, or whether it is organized in separate divisions exercising a high degree of day-to-day autonomy. Even if the governing decisions are made jointly by top corporate management and an unincorporated division, they cannot by themselves violate Section 1, no matter what their impact on competition or competitors.[1]

The intra-enterprise conspiracy doctrine holds that the same internal business decisions, made in the same way and for the same purposes, can give rise to the full force of Section 1 liability if a corporate enterprise has chosen to incorporate its divisions as wholly-owned subsidiaries. The doctrine thus attaches antitrust significance, and the

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[1] *See* Pet. App. at A-9; *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587 n.19 (8th Cir. 1981); *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

risk of severe liability, to the choice of a particular method of internal organization. By imposing the threat of antitrust sanctions, the doctrine burdens or skews internal business decisions that are unrelated to antitrust concerns.

A. *The Use Of Wholly-Owned Subsidiaries Affords Valuable Business Benefits Unrelated To Antitrust Concerns.*

Such a drastic difference in the treatment of incorporated as opposed to unincorporated divisions cannot be attributed to any substantive difference between these alternative forms of internal organization. Where the subsidiary corporation is wholly owned, the difference is one of form only. While the corporate formalities must be respected in order to accomplish some of the benefits of incorporation, separate incorporation does not in any substantive way free a division from the control of the parent company. The managers of the subsidiaries serve at the pleasure of their sole stockholder, and their mandate is to serve its interest. Although some subsidiary corporations enjoy substantial autonomy in day-to-day decisionmaking, the same is true of many unincorporated divisions;[2] and in both cases such autonomy exists only at the sufferance of top management. In short, the choice of the form of separate incorporation in itself implies nothing about how or by whom business decisions are actually made.

Instead, the use of subsidiary corporations is dictated by practical business and legal considerations. In a variety of circumstances, wholly-owned subsidiary corporations offer important business advantages that are frequently pro-competitive and are generally unrelated to anti-competitive objectives or consequences.[3]

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[2] O. Williamson, *Markets and Hierarchies* 148-50 (1975).

[3] *See Report of the Attorney General's National Committee to Study the Antitrust Laws* 34 (1955) ("The use of subsidiaries is

The decision of an American corporation to incorporate a subsidiary in a foreign country, for example, is usually dictated by the laws of that country or by the exigencies of foreign operations.[4] Some countries require local incorporation. In others, the failure to incorporate a local operating unit can subject the American parent to undesirable tax, regulatory, or foreign private law consequences.[5] Separate incorporation is in many instances essential in order to permit American corporations to do business abroad, and neither the motives for nor the results of such separate incorporations can be viewed as anything but pro-competitive.

Indeed, the benefits of foreign subsidiaries to American corporations that do business abroad are so significant that the United States has consistently opposed adoption of an intra-enterprise conspiracy doctrine in international codes of multinational corporate conduct.[6] In 1980, after a sustained negotiating effort, the United States succeeded in persuading the United Nations General Assembly to include in its international antitrust code language expressly repudiating the concept of intra-enterprise conspiracies. The provision of that code analogous to Section 1 of the Sherman Act states that collusion between enterprises does not include

> "dealing[s] with ea[c]h other in the context of an economic entity wherein they are under common con-

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generally induced by normal, prudent business considerations."); *see also* M. Eisenberg, *The Structure of the Corporation* 280 (1976); C. Rohrlich, *Organizing Corporate and other Business Enterprises* § 10.02 (5th ed. 1975); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va. L. Rev. 183, 186 (1955); Murphy, *Corporate Divisions v. Subsidiaries*, 34 Harv. Bus. Rev. 83, 87 (1956); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 26-28 (1968).

[4] *See* 1 J. Atwood & K. Brewster, *Antitrust and American Business Abroad* § 7.37, at 222 (2d ed. 1981).

[5] *Id.*

[6] *Id.* § 7.39, at 226-27; *see* 2 *id.* §§ 13.02-13.08.

trol, including through ownership, or otherwise not able to act independently of each other." [7]

The diplomatic effort behind that achievement, which ironically is undermined by renewed application of the intra-enterprise conspiracy doctrine under the Sherman Act, underlines the importance of separate incorporation to the efforts of American multinational corporations to compete abroad.

The need for separate incorporation in foreign operations is mirrored in some domestic jurisdictions. In order to ensure regulatory and legal accountability or to protect local businesses, many states attempt to restrict access to local markets for businesses not incorporated in those states, place restrictions on out-of-state corporations, or make it as difficult to qualify to do business in the state as it is to incorporate a local subsidiary.[8] Accordingly, out-of-state corporations commonly incorporate a subsidiary when entering markets in those states. Far from restraining trade, the consequence of these separate incorporations is to increase competition in protectionist states.

In some cases, separate incorporation is motivated by a desire to minimize tax liabilities.[9] Although federal

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[7] The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ¶ D, § 3, U.N. Doc. TD/RBP/Conf./10/Rev. 1. This feature of the code was emphasized in a joint letter authored by the Departments of State and Justice announcing the new guidelines and explaining them to the American business community. *See* Open Letter from R. Hormats, W. Baxter & D. Robinson (Nov. 9, 1981), *reprinted in* 82 Dep't St. Bull. 34 (Jan. 1982).

[8] *See* 2 A. Dewing, *The Financial Policy of Corporations* 983-85 (5th ed. 1953); C. Rohrlich, *Organizing Corporate and other Business Enterprises* § 10.02 (5th ed. 1975); *see also Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 592 (1943).

[9] *See generally* B. Bittker & J. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶¶ 15.01-15.05 (4th ed. 1979).

tax law changes of the late 1960's have reduced some of the tax incentives for separate incorporation, many legitimate federal tax advantages remain.[10] Moreover, parent corporations that responded to the greater tax advantages available before 1970 have retained their multi-corporate forms in part because of the burdens that de-incorporating subsidiaries would entail. Separate incorporation also permits multi-corporate enterprises to minimize state taxation.[11] From an antitrust standpoint, such tax minimization effectuated through separate incorporation is at least neutral, if not affirmatively pro-competitive.

Many companies incorporate a subsidiary in order to preserve the good will or exceptional performance associated with an acquired business. The acquiring corporation sometimes chooses to retain the separate incorporation of its new subsidiary in order to preserve the latter's identity or reputation in a particular line of business or geographic area. In other cases, the management of the acquired corporation insists as a condition of the sale that it be permitted to retain a nominally separate corporate identity. Assuming that the acquisition itself satisfies the requirements of Section 7 of the Clayton Act, 15 U.S.C. § 18, maintaining separate incorporation in such cases has no consequences with which the antitrust laws should be concerned.

Other common motivations for separate incorporation include attainment of financial flexibility or limited liability; compliance with federal regulatory statutes that require regulated businesses to incorporate subsidiaries in order to enter non-regulated lines of business;[12] and

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[10] *Id.*

[11] Indeed, petitioner Copperweld, after acquiring the assets of Regal in 1972, set up Regal as a separate corporation in order to avoid discriminatory double taxation at the state level. *See* Petition for Certiorari at 3; Kaplan Tr. 5702; Smith Tr. 3051.

[12] *E.g.*, Bank Holding Company Act, 12 U.S.C. § 1843(c)(8).

improved management performance [13] or better labor relations [14] thought to result from the maintenance of a separate corporate identity.

All these diverse reasons for separate incorporation described above are geared towards either affording a business enterprise an opportunity to compete or enhancing its competitive posture. In some cases, the use of separate corporations is necessary in order that the enterprise may compete at all in a particular country or state or in a particular line of business. In many cases, the result is to increase output, improve efficiency, and benefit consumers—all objectives that a sound antitrust policy seeks to facilitate. In any event,

> "[t]he business, tax, social, or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control."

P. Areeda, *Antitrust Analysis* 399-400 (3d ed. 1981). None of these reasons for separate incorporation is anti-competitive, and none is of a nature that on its face calls for any heightened antitrust scrutiny.

B. *The Intra-Enterprise Conspiracy Doctrine Severely Penalizes And Deters The Use Of Wholly-Owned Subsidiaries.*

Notwithstanding the absence of anti-competitive implications in a decision to use wholly-owned subsidiaries, the intra-enterprise conspiracy doctrine imposes a severe penalty upon that choice. Any corporation that adopts this form of internal organization thereby opens a wide range of otherwise internal business decisions to the risk of antitrust liability under Section 1.

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[13] *See National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 438 n.21 (1949); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U. L. Rev. 20, 28 (1968).

[14] *See Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).

The threat of civil antitrust liability is, and was designed to be, a powerful deterrent. Liability under Section 1 entails both treble damages—three times the actual damages incurred—and generous attorneys' fees for the prevailing party. *See* Clayton Act § 4, 15 U.S.C. § 15. The remedy is punitive in its intent and in its effect. It was designed by Congress to make the consequences of an antitrust judgment so intimidating that actual or potential competitors would steer far clear of potentially anticompetitive conduct. *See* 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 331b, at 149-50 (1978). And where companies receive good antitrust advice, or where they have been burned by oversized verdicts or settlements of antitrust lawsuits, the deterrent works.

The intra-enterprise conspiracy doctrine trains the full fire power of that potent deterrent against the use of separately incorporated divisions or subsidiaries. It thereby deprives some business enterprises that would otherwise have chosen incorporation of the uncontroversial benefits of the multi-corporate form. And it impels companies that adopt or retain that form in spite of the risk to impose artificial constraints on dealings between parent and subsidiary in the interest of avoiding interaction between them on matters that may involve antitrust risk.

The deterrent effect is heightened by the inherent uncertainty about what conduct will be deemed offensive to the antitrust laws in particular cases. The standards of the antitrust laws are broad and general. *See Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). They are constantly evolving. Their application frequently depends heavily on complex particular facts. And they are ultimately interpreted most often by juries, who may be neither conversant with nor sympathetic towards the business context against which the challenged conduct is to be measured. Moreover, like all effective deterrents, the treble damage remedy under the antitrust laws is capable of hitting unintended targets. The

expenses and burdens of antitrust litigation, the uncertainties of jury verdicts, and the consequences of an adverse result can make antitrust complaints effective *in terrorem* devices in the hands of antitrust plaintiffs, capable of affecting business conduct and exacting significant settlements even in some cases where they have little merit. These inherent aspects of potential antitrust liability are all exacerbated under the intra-enterprise conspiracy doctrine, where the risk of liability attaches to internal business decisions and conduct that are ordinarily outside the scope of Section 1, and where the requirements of the law are accordingly even harder to predict.

The deterrent or penalty on the use of separate corporations is not reduced by the efforts of some lower courts to narrow the scope of the conduct to which the intra-enterprise conspiracy doctrine may be applied. Those limiting standards may reduce the number of cases in which liability is actually imposed on conduct of a parent and its wholly-owned subsidiary. But they do not reduce —indeed, they may increase—the uncertainty as to when or whether the doctrine will be applied.

The Court of Appeals below, applying an "all facts and circumstances" test, identified numerous factors to be considered in determining "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible." Pet. App. at A-11. The jury had been specifically instructed as to nine factors, and was told to consider "any other facts that you find that are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." Pet. App. at A-41. It was left to the jury, in answering this almost metaphysical question, to weigh all the identified and unidentified factors, determine how they might bear on the question of capacity to conspire, assess their relative weight, and arrive at a necessarily subjective and conclusory result. Other courts have iden-

tified additional relevant factors or have weighed the same factors differently.[15] No corporation with a wholly-owned subsidiary can predict with confidence how such a kaleidoscope of potentially relevant facts and circumstances will be resolved in any particlular case, so as to be able to avoid the risk of antitrust liability for internal business decisions.

Other limiting rules are similarly difficult to apply with any sufficient degree of predictability. One test, for example, attempts to determine whether an intra-enterprise collaboration was designed to restrain the trade of a third party. In practice, most pricing, marketing, and selling policies are designed at least to affect the trade of third parties, and virtually all such decisions will in fact have an effect on competitors even if they are not so designed. A competitor who is particularly affected by such a decision and who suffers serious injury will almost always be able to state a *prima facie* claim, sufficient at least to get to a jury, that the conduct was designed to injure him or others similarly situated.

Similarly, following this Court's dicta in *Keifer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951), and *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975), a few courts have attached importance to whether or not commonly-owned companies "hold themselves out" as competitors.[16] The cases that apply this test have not attempted to define what constitutes such a "holding out." None has suggested that the companies must actually claim to be competing. Instead, "holding out" seems to mean only that they are identified as separate corporations and that they sell products that may be

[15] *See, e.g., Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 55-61 (1981).

[16] *See, e.g., University Life Ins. Co.* v. *Unimarc, Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1043-46 (E.D. Mich. 1976).

viewed as alternatives by some purchasers. For the many multi-corporate enterprises whose subsidiaries sell in related markets, this rule provides no escape at all from the threat of intra-enterprise liability.[17]

Moreover, even if the limiting rules were sufficiently predictable to identify the kinds of intra-enterprise dealings that may give rise to liability under Section 1, they focus on questions that are themselves not significant for antitrust purposes.[18] They also introduce their own additional distortions into the internal decisionmaking process. The thrust of rules such as the "all facts and circumstances" and "holding out" tests is to find liability where subsidiary corporations, though subject to the ultimate control of the parent, are given some delegated day-to-day operational autonomy. The rules thus have the perverse effect of discouraging decentralized decisionmaking within a business enterprise, even as they are applying Section 1 on the theory that separate decisionmaking within a multi-corporate enterprise should be preserved.

In sum, whether in its pure form or under limiting rules, the intra-enterprise conspiracy doctrine severely burdens the use of wholly-owned subsidiaries and irrationally distorts internal corporate decisionmaking.

II. The Burdens Imposed By The Intra-Enterprise Conspiracy Doctrine Are Not Required By Section 1.

The remaining question is whether this unreasonable burden on the choice of a multi-corporate form of internal organization is nonetheless required by the terms or clear intent of Section 1. We submit that it is not.

[17] Another limiting principle, the so-called "sole decisionmaker rule," creates an exemption to the intra-enterprise conspiracy doctrine for corporations that are under the ownership and direction of a single person. *See Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979). This rule does provide reasonable certainty and predictability to one-man corporations, but it leaves the vast majority of multi-corporate enterprises subject to the full force of the doctrine.

[18] *See* Part II, *infra*.

As shown above, the distinction between an unincorporated division, which cannot conspire, and an incorporated division or wholly-owned subsidiary, is a distinction without a difference for antitrust purposes. The distinction is not based on any articulated theory as to how the objectives of Section 1 are served by extending its reach to coordinated actions between a parent and its wholly-owned subsidiary that would not otherwise offend the antitrust laws. Neither the decisions of this Court that appeared to recognize the possibility of a conspiracy between a parent and its wholly-owned subsidiary,[19] nor any of the courts of appeals that have applied the doctrine in such cases, has attempted such a justification. The distinction is based instead on the fact that a separately incorporated subsidiary is legally a distinct person, whereas an unincorporated division is not. Therefore, a joint act of a parent and its subsidiary can be

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[19] The Court stated in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), that since a parent and subsidiary "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." This statement was not necessary to the holding in *Perma Life*, which also rested on an alternative ground. The Court did not explain why the "privilege" of separate incorporation justifies heightened antitrust scrutiny. Examination of the Court's language in *Perma Life* suggests that the Court had in mind the traditional doctrine of state corporation law applicable to piercing the corporate veil. *See* F. Powell, *Parent and Subsidiary Corporations* 4-5 (1931) (enjoyment of the privilege of limited liability gives rise to obligation to observe corporate formalities). This doctrine does not have application to antitrust concerns. *See* Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23, 63-66 (1981).

The other decisions of this Court that appear to recognize the possibility of intra-enterprise conspiracies likewise do not address the question of how the doctrine accords with the policy of Section 1. *See Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons., Inc.*, 340 U.S. 211 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

viewed as the act of two legal persons and can technically satisfy the plurality requirement of Section 1.

But the mere fact that two legal persons are involved does not establish that they are capable of conspiring within the meaning of Section 1.[20] The question is whether the concerted act is at root a bilateral act of the kind Section 1 is designed to reach. Section 1 imposes liability for conduct arising from combinations or conspiracies that would give rise to no antitrust claim at all if it was unilateral conduct with the same intent and the same effect on third parties. The key to Section 1 liability is that the combinations it proscribes eliminate competition or potential competition between independent economic actors who ought not to be joining forces.

By that measure, "combinations" between a parent and its wholly-owned subsidiary are manifestly not within the purview of Section 1. Such "conspirators" are already inseparably combined. There is no effective competition between them; if they do engage in anything resembling competition, it is competition controlled by and instantly extinguishable by the parent, and permitted only to the extent it is judged to serve the parent's economic interests. Joint acts of such economically indistinguishable entities do not eliminate any competition that Section 1 protects.

That the antitrust laws are concerned with economically separate actors, not with legally separate persons, is evident in other areas of antitrust law. Antitrust

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[20] *See Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir.), *cert. denied*, 103 S.Ct. 362 (1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-94 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-17 (8th Cir. 1976); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

analysis commonly treats the economic interests of the parent and subsidiary as the same. This is so, for example, in determining the extent of market power for purposes of the anti-monopolization provisions of Section 2 of the Sherman Act, 15 U.S.C. § 2; or in measuring the impact of a merger under Section 7 of the Clayton Act, 15 U.S.C. § 18.[21] If a company acquires another corporation, the acquisition must pass muster under Section 7 on the assumption that the acquisition eliminates competition between the two companies. The absence of genuine competition is presumed. Where an acquisition has survived antitrust scrutiny on this presumption, what sense does it make to require the parent and its new subsidiary to act as though they are independent competitors?

Indeed, under these provisions, common *control* is enough to establish the economic unity of separate corporations, even where there is substantial outside ownership. Where there is no outside ownership at all, there can be no possible basis for contending that a parent and subsidiary are separate actors whose joint acts should be policed under Section 1.[22]

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[21] The formal legal separateness of parents and subsidiaries has aslo been recognized as irrelevant under other provisions of the antitrust laws. For example, under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), a sale from a parent to its wholly-owned subsidiary is not a sale to a purchaser for purposes of that section. *See Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 966-67 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979). Similarly, the prohibition of Section 10 of the Clayton Act, 15 U.S.C. § 20, against certain dealings of a common carrier and a company with an interlocking directorate is inapplicable to dealings between a parent and its wholly-owned subsidiary. *See Cleary* v. *Chalk*, 488 F.2d 1315, 1322-23 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

[22] Where there is outside ownership, many of the same considerations support the conclusion that no parent and subsidiary under common control can be considered separate economic entities capable of conspiring together. It is, however, unnecessary to reach that question to decide the question under review in this case.

CONCLUSION

Parent corporations, whether they separate their operations and functions on a subsidiary or a divisionalized basis, reign over a single economic enterprise. This Court's analyses of the Sherman Act have commonly been guided by "demonstrable economic effect rather than . . . formalistic line drawing." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977); *see also Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). The intra-enterprise conspiracy doctrine draws a line at the point of separate incorporation. That point has no significance for antitrust purposes.

Accordingly, the Chamber and the NAM urge this Court to reverse the decision of the court below and to hold that a parent corporation and its wholly-owned subsidiary are not capable of conspiring with one another within the meaning of Section 1.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

—v.—

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF KAISER ALUMINUM & CHEMICAL CORPORATION IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

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No. 82-1260

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

—v.—

INDEPENDENCE TUBE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF KAISER ALUMINUM & CHEMICAL CORPORATION IN SUPPORT OF PETITIONERS

Kaiser Aluminum & Chemical Corporation ("Kaiser") hereby submits this brief as *amicus curiae* in support of petitioners. All parties have consented to the filing of this *amicus curiae* brief pursuant to Rule 36.2 of the Rules of this Court. *See* letters from counsel to petitioners and counsel to respondent on file with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

Kaiser is vitally interested in the outcome of this appeal both because it will affect the resolution of a similar case to which Kaiser is a party and because Kaiser continues to conduct certain business operations through wholly-owned and commonly managed subsidiaries. Particularly in light of this latter fact, Kaiser is representative of the many business enterprises that have a direct interest in the proper resolution by this Court of the confused and counterproductive state of the law regarding the intra-enterprise conspiracy doctrine.[1]

The Court's decision in the present case will affect the outcome of *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, No. 83-1079 (3d Cir. filed Jan. 31, 1983) currently on appeal to the United States Court of Appeals for the Third Circuit, a private treble damage antitrust action in which Kaiser is a defendant and has been held liable, *inter alia*, for conspiring with its former wholly-owned subsidiary, Kaiser Aluminum & Sales, Inc. ("KASCI")[2] to restrain trade in the aluminum culvert market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Kaiser and KASCI initially obtained a directed verdict on that claim (as well as on others under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14). On appeal to the Third Circuit, the verdict was reversed in significant respects and remanded for trial. In so ruling, the Third Circuit rejected Kaiser's argument that it was incapable as a matter of law of conspiring with its wholly-owned subsidiary, KASCI, holding that such an argument was foreclosed by this Court's decisions, which the Third

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1 Indeed, because of Kaiser's strong interest in the issues raised on this appeal, it has retained specially to prepare its *amicus* brief Messrs. Handler and Smart who have written an extensive critical analysis of the intra-enterprise conspiracy doctrine.

2 KASCI has since been merged into Kaiser, has ceased to have a separate corporate existence, and its activities are now conducted directly by Kaiser.

Circuit interpreted as upholding "the viability of the 'intra-enterprise conspiracy' theory as applied to separately incorporated entities." *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). As a result, unlike Copperweld, Kaiser was not even given an opportunity on remand to try to convince the jury that it and its subsidiary KASCI were a single entity and should be treated as such, and it was held subject to Sherman Act liability for intra-enterprise conspiracy.

The present case raises basic issues that are of critical and continuing importance to Kaiser. Although Kaiser no longer operates KASCI as a subsidiary, it continues to do business through other subsidiaries. The present state of the law of intra-enterprise conspiracy creates serious problems for companies, like Kaiser, which operate throughout the United States and in foreign countries, and which desire, for a variety of legitimate business reasons, to conduct some or all of their business activities through wholly-owned subsidiaries. The conflict among the courts of appeals and district courts makes it extremely difficult, if not impossible, to determine how a company should structure parent-subsidiary and affiliate relationships to avoid potential antitrust liability for those discussions and agreements which clearly would be lawful if engaged in by a company operating through divisions. Moreover, the literal reading of this Court's past decisions, which the Third Circuit adopted in Kaiser's case, makes it virtually impossible for a parent and subsidiary to avoid antitrust exposure.

Kaiser submits that the intra-enterprise conspiracy doctrine advances none of antitrust's goals and has proven to be counterproductive and contrary to the public interest.

STATEMENT OF THE CASE[3]

This case raises the issue of whether a parent corporation and its wholly-owned subsidiary are capable of conspiring with each other in violation of Section 1 of the Sherman Act. Petitioners were found liable below for an antitrust conspiracy to induce a third party, Yoder, to cancel its contract to provide Independence with a tubing mill, which delayed its entrance into the structural steel tubing market for some nine months. Both Copperweld and Regal were found to have acted in concert to induce Yoder's breach of contract and were held liable for treble damages of almost $7.5 million. However, in the common law action only Copperweld was held to have wrongfully induced the Yoder breach, not Regal.

The Court of Appeals for the Seventh Circuit affirmed the jury's verdict, rejecting petitioners' frontal assault on the intra-enterprise conspiracy doctrine, and, curiously, applying a stricter standard of liability for single damages under the common law claim of inducing breach of contract than for treble damages under the Sherman Act claim. *Independence Tube Corp.* v. *Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982). Although recognizing the "almost uniformly critical" reception the intra-enterprise conspiracy doctrine has received from commentators and acknowledging their conclusion that it "surfaces in private suits" as a method for plaintiffs to "plead their way around basically unilateral action" which does not rise to the level of a Section 2 violation, the court of appeals nevertheless felt inhibited by this Court's prior decisions[4] from abolishing

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3 Because petitioners' brief describes the facts and proceedings below in some detail, we have limited ourselves to a brief statement of the essential facts.

4 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

the doctrine "root and branch." *Id.* at 316-18. Nonetheless, the Seventh Circuit did not apply this Court's formulation of the rule as set forth in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968), but instead ostensibly substituted its own version as articulated in its prior decision *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).[5] There the court had focused on the practical relationship between the parent and the subsidiary, using a variety of factors to decide "when there is enough separation between the [parent and subsidiary] to make treating them as two independent actors sensible." *Copperweld*, 691 F.2d at 318.

SUMMARY OF ARGUMENT

The central issue before the Court is whether the intra-enterprise conspiracy doctrine promotes the goals and objectives of antitrust law and bolsters its enforcement, or whether it is counterproductive and discourages corporations from structuring their corporate relationships in the most efficient and effective manner. It is our submission that when analysis is focused on antitrust policy as such, one can discern no need for the doctrine, its elimination would not hamper effective antitrust enforcement, and, indeed, would strengthen the forces of competition in the marketplace. Nothing in the legislative history of the Sherman Act or in this Court's early rulings interpreting the statute supports the view that Congress intended the legality of business behavior to turn on the corporate form the business chooses for the conduct of its affairs.

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5 In fact, however, the court of appeals approved a jury instruction which failed to mention three of the *Photovest* factors and substituted others not referred to in the case. *Copperweld*, 691 F.2d at 318-19.

ARGUMENT

I. The Intra-Enterprise Conspiracy Doctrine Serves No Useful Purpose And Should Be Abandoned.

What is most striking in this case is that none of the parties to the appeal supports the intra-enterprise doctrine as formulated by this Court in a series of decisions.[6] This includes the respondent,[7] the court below,[8] the *amici,* as well as the petitioners. Indeed, most of the circuits have substituted their own rules for that of this Court,[9] and there is virtual unanimity

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6 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 (1951); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947).

7 Respondent urges the Court to adopt a rule that distinguishes between concerted activities that relate to "internal management affairs" and those "designed to restrict the trade of third parties." On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Respondent's Brief In Opposition, Feb. 28, 1983, at 13 ("Respondent's Brief In Opposition").

8 *Copperweld,* 691 F.2d at 318.

9 Only in the First, Third, and Fifth Circuits has the rule been followed in its pristine form. *E.g.,* George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied,* 421 U.S. 1004 (1975); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied,* 439 U.S. 876 (1978); H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244-45 (5th Cir. 1978). The Seventh, Eighth, and Ninth Circuits have adopted an "all the facts and circumstances" test. *E.g.,* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726-27 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-90 (8th Cir. 1981); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054 (9th Cir.), *cert. denied,* 103 S. Ct. 57 (1982); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980). Other tests include the "holding out as competitors" approach, *e.g.,* Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), *aff'd per curiam,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972); the "sole decisionmaker" rule, *e.g.,* Windsor Theatre Co. v. Walbrook Amuse-

amongst scholars and commentators that *Kiefer-Stewart* and its progeny should be specifically overruled.[10] The rejection of the rule is not limited to the Chicago School of Economics, but is the view of writers covering the entire spectrum of economic and antitrust opinion. Those charged with the enforcement of the antitrust laws have consistently over the years refused to apply the Court's formulation of the doctrine[11] and, in this case, both the Department of Justice and the Federal Trade Commission are urging the Court, as are we, to abandon the doctrine altogether.

The intra-enterprise conspiracy doctrine has failed to promote the goals of antitrust, has been the source of much confusion and uncertainty, and has produced a large volume of expensive litigation, consuming a vast amount of judicial effort and time.[12] Its only accomplishment has been to compel corporations to avoid the rigors of the doctrine by converting

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ment Co., 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); and the attempt to distinguish between concerted activity aimed at outsiders and concerted activity that restrains no outsider's trade, *e.g.*, REA Express, Inc. v. Alabama Great S.R.R., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom.* Sowerwine v. United States, 431 U.S. 961 (1977).

10 The commentaries are collected in Handler & Smart, The Present Status Of The Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, n.3 (1981).

11 The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws criticized the doctrine as "unrealistic" in its expectation that wholly-owned affiliates compete. *Id.* at 35. Previous administrations have declined "to push the intracorporate conspiracy doctrine as far as a free-wheeling interpretation of the *Timken* case might suggest," Turner, Address Before the American Bar Association, 10 Antitrust Bull. 685, 687 (1965). Indeed, the Department of Justice has entered into numerous consent decrees over the years which explicitly provide that the prohibitions therein are inapplicable to activities involving a parent and its subsidiaries. The decrees are collected in Handler & Smart, *supra*, at 66 n.207.

12 *See* App. H to Petition for Writ of Certiorari, where the cases are collected.

their wholly-owned subsidiaries into divisions—a change which plainly does not advance any antitrust goal.

A. There Is No Need to Invoke the Fiction of Intra-Enterprise Conspiracy to Penalize Improper Unilateral Conduct.

Where there is monopoly power, unilateral action in willful maintenance of that power is condemned by Section 2 of the Sherman Act.[13] Section 1, conversely, is limited to concerted activity by a plurality of actors.[14] Analysis of the cases indicates that the intra-enterprise conspiracy doctrine is not needed to police behavior that is of any real concern under the antitrust laws.

In *Kiefer-Stewart* and *Perma Life*, as well as in *United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941), the earliest case applying the doctrine, there were present vertical multilateral arrangements which under contemporary antitrust analysis themselves may restrain trade in violation of Section 1.[15] In the present case, the inducement of a breach of contract was actionable as a

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13 "Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. Section 2 also prohibits combinations and conspiracies to monopolize.

14 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1.

15 In *General Motors*, the requirement that GM dealers finance their cars from GM's finance subsidiary was actionable as an unlawful tie-in. 121 F.2d at 402. In *Perma Life*, the requirements in the dealers' franchise agreements that they purchase exclusively from Midas and sell at fixed prices were deemed actionable by the Court as "a combination between Midas and [the dealer], as of the day he unwillingly complied with the restrictive franchise agreements . . . or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination.' " 392 U.S. at 142 (citing Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968) and United States v. Parke, Davis & Co., 362 U.S. 29 (1960)).

common law tort. A vast array of anticompetitive practices have been held unlawful by the FTC and the courts as "unfair methods of competition."[16] Moreover, to the extent unilateral conduct is taken with a specific intent to monopolize and creates a dangerous probability of success in achieving monopoly in the relevant market, Section 2's interdiction of attempts to monopolize is also available as a remedy.

The intra-enterprise conspiracy doctrine has principally been invoked in situations where there have been disputes between suppliers and customers arising out of terminations of the dealerships or refusal to deal—typical unilateral conduct protected by the *Colgate* doctrine.[17] That was the very situation presented by *Kiefer-Stewart*, where two wholly-owned subsidiaries of the Seagram corporate family, Seagram and Calvert, refused to sell to plaintiff, a wholesale liquor dealer, who would not observe the maximum prices imposed by defendants. It was only by artificially regarding the sales subsidiaries—companies handling different brands produced by the same corporate family—as separate entities that antitrust liability could be imposed—a liability which was avoided for the future by the simple expedient of Seagram's transforming the separately incorporated sales companies into unincorporated sales divisions.[18]

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16 The cases are collected and discussed in Handler & Steuer, Attempts To Monopolize And No-Fault Monopolization, 129 U. Pa. L. Rev. 125, 174-82 (1980).

17 In United States v. Colgate & Co., 250 U.S. 300, 307 (1919), this Court held that a manufacturer, acting alone, may unilaterally refuse to deal. *See* ABA Antitrust Section, Monograph No. 9, Refusals to Deal and Exclusive Distributorships (1983).

18 The courts have uniformly held that a corporation is incapable of conspiring with its unincorporated divisions. *E.g.*, H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 206 (5th Cir. 1969); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 82-83 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Poller v. Columbia Broadcasting Sys., 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

An examination of the some 200 cases spawned by *Kiefer-Stewart* and *Perma Life* discloses that the doctrine (a) provides a technical basis in treble damage litigation for turning otherwise lawful behavior, such as a refusal to deal, into an antitrust violation;[19] (b) duplicates an existing Section 1 remedy as in the case of vertical agreements, or an existing Section 2 remedy where the conduct at issue also constitutes an attempt to monopolize or monopolization; or (c) converts a common law tort or act of unfair competition into an antitrust infraction.

The doctrine clearly has taken seed and grown in private actions because it is easier to prove a violation of Section 1 than Section 2. To the extent that there may be a need to extend the scope of the Sherman Act to behavior not covered by Sections 1 and 2 of the Act—a need which we do not believe exists—the intra-enterprise conspiracy doctrine does not seem appropriate for the task. For the rule only reaches behavior not rising to the level of a Section 2 violation in the circumstance where a parent operates through a subsidiary with which an agreement can be artificially alleged. The same behavior engaged in by a company in concert with its unincorporated division is not reached. If the Sherman Act is to be expanded to cover such behavior, a more evenhanded and less fortuitous approach should be devised.

B. There Is No Sound Basis for Distinguishing Agreements Between Corporations and Divisions on the One Hand, and Corporations and Subsidiaries on the Other.

As we have seen, the courts have uniformly held that a corporation cannot conspire for the purposes of Section 1 of the Sherman Act with its own divisions. The reason is that any other approach would be unworkable as a matter of business

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19 The rule enables plaintiffs to plead an antitrust action that will survive a motion to dismiss. While the cases are more often than not lost, the ensuing litigation is extremely wasteful and burdensome and serves no useful purpose.

practice. In *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), the Ninth Circuit emphasized that no corporation of any size can operate without divisions and that sound management requires delegation of authority within an organization. At the same time, it is inevitable that corporate divisions, no matter how much autonomy they may have, cannot operate in a void or completely independent of each other and must consult and agree on policies. *Id.* at 83-84. In reversing the district court's ruling that Seagram was capable of conspiring with its divisions, the court of appeals held that to adopt any other rule would in effect hand plaintiffs "on a silver platter, an automatically self-proving conspiracy." *Id.* at 84.

This same logic applies in the case of parent-subsidiary relations. Indeed, as the court below recognized, "there may be little difference between a wholly-owned subsidiary and a fully integrated division." *Copperweld*, 691 F.2d at 316. Obviously, wholly-owned subsidiaries cannot operate independently of their parents and also must consult and agree on policies. But under the literal rule of *Kiefer-Stewart* and *Perma Life*, such consultations can easily be turned into the stuff of an antitrust claim. For example, if the subsidiary is the sales arm or agent for the parent, the parent may well direct the subsidiary as to the price at which its products should be sold, thereby exposing itself to a potential price-fixing suit from a customer. Likewise, if a parent owns two subsidiaries which sell competing products, assigns them territories and directs that they not compete against each other, all three could be charged with a horizontal conspiracy in restraint of trade. Similarly, if affiliated companies follow parallel pricing and marketing policies, they could conceivably be sued on a theory of conscious parallel action with plus factors.[20] The manufacturer who orders a wholly-

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20 *See, e.g.*, Venzie Corp. v. United States Mineral Prods. Co., 521 F.2d 1309 (3d Cir. 1975). "Plus factors" refer to the additional elements that must be demonstrated before a factfinder may permissibly infer a conspiracy from evidence of parallel business conduct. These include, *inter alia*, (1) a

owned subsidiary to cut back or shut down its production or to refuse to deal with certain customers or in certain territories could also be exposed to treble damage liability, despite the fact that such decisions are frequently made for sound business reasons. Foreign corporations that operate in the United States through wholly-owned subsidiaries would likewise be at risk under the Sherman Act if they dictate to whom their subsidiaries may sell or instruct the subsidiaries to refuse to deal with a third party. The list of such everyday actions that could become potential sources of violation is virtually endless. As in the case of a corporation and its divisions, the inevitable necessary communications among a parent and its subsidiaries or between affiliates would become self-proving conspiracies.

The courts have also uniformly concluded that a corporation cannot conspire with its officers or directors under Section 1 because it necessarily must act through its agents.[21] To allege a conspiracy between a corporation and its officers is to accuse the corporation of conspiring with itself.[22] There is no sound reason why the rule should be any different when a parent acts through the officers of its wholly-owned subsidiary—who more often than not are also officers of the parent itself, as is the situation in the present case.

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finding that the business conduct at issue is not in the economic interests of the defendants, and (2) additional evidence of improper motivation in entering the agreement. *Id.* at 1314.

21 *See, e.g.*, H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 287 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646, 654 n.7 (5th Cir. 1977); Morton Bldgs. of Neb., Inc. v Morton Bldgs., Inc., 531 F.2d 910, 917 (8th Cir. 1976); Walker v. Providence Journal Co., 493 F.2d 82, 87 (1st Cir. 1974); Goldlawr, Inc. v. Shubert, 276 F.2d 614, 617 (3d Cir. 1960); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

22 *E.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

Not only does the intra-enterprise conspiracy rule fail to explain why antitrust law should afford different treatment to agreements between corporations and their divisions, on the one hand, and agreements between corporations and their subsidiaries, on the other; rigorous enforcement of the rule would simply lead corporations to convert subsidiaries into divisions, with no additional competition between the affiliated entities. What is more, the doctrine ignores the essential fact that there is nothing inherently anticompetitive about the use of corporate subsidiaries which are formed in response to a variety of legitimate legal and financial considerations completely unrelated to antitrust concerns.[23] Certain advantages of doing business through a subsidiary may well result in economic efficiencies that strengthen external competition in the marketplace,[24] as the court of appeals recognized below.[25] After all, the principal concern of antitrust is with market competition, where separate, independent businesses vie against one another for public patronage, not with the internal relationships or organization of a company. To the extent that a company is able to cut costs and distribute its product

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23 Among reasons cited for doing business through a subsidiary rather than a division are: (1) greater managerial and financial flexibility; (2) increased efficiencies in production or distribution; (3) tax advantages; (4) easier access to new capital; (5) expansion into a new territory or country where local law prohibits or makes onerous operation through the parent; (6) limitation of tort and contract liability; (7) facilitation of resort to various accounting methods, tax credit elections, or accounting periods most suitable to specialized needs; (8) facilitation of or avoidance of antidiscrimination limitations on pension and profit-sharing plans; and (9) maintenance of the goodwill or *esprit de corps* associated with a particular subsidiary. *See, e.g.*, McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 186 (1955); Willis & Pitofsky, Antitrust Consequences Of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20, 27-28 (1968); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 728-29 (1977).

24 Indeed, Kaiser formed its subsidiary KASCI to minimize state tax liabilities which reduced its cost of doing business.

25 *Copperweld*, 691 F.2d at 317 & n.7.

through a wholly-owned subsidiary because of tax or labor advantages that result from separate incorporation, competition may intensify. A corporation may decide to create a subsidiary in order to enter into a new market that it otherwise would not enter without the advantages that separate incorporation provides. In such circumstances, competition is strengthened and consumers benefit. The current rule in our view is clearly counterproductive in practice and is without any redeeming virtues.

C. The Alternative Formulations of the Intra-Enterprise Rule Are Unsatisfactory.

Respondent has proposed that the Court read the extensive case law which has developed in this area as enunciating a distinction between agreements that affect only the internal affairs of the parent and the subsidiary and agreements that affect third parties. In addition, the Seventh Circuit, as well as the Eighth and Ninth Circuits, has adopted an "all the facts and circumstances" test, which is designed to limit the breadth and reach of *Kiefer-Stewart* and *Perma Life*. Additional alternative tests have also been proposed and applied by the courts. However, none of these is in the final analysis satisfactory because none avoids the central problem of the doctrine—its lack of rationale and of any predictability.

We turn first to the rule urged by respondent. Respondent's attempt to distinguish between activities dealing with internal management and those directed at third parties ignores the inescapable fact that decisions involving marketing, sales, distribution and the like will almost always affect competitors or customers. A parent's decision, for example, that a subsidiary should lower its price to increase its volume, may well take business away from competitors who do not meet this competition and who may claim that the pricing decision was predatory in nature and the product of a conspiracy aimed at driving them out of business. A decision by a manufacturer that a subsidiary should cut distribution costs by withdrawing from a certain geographical area or refuse to sell to a class of cus-

tomers likewise affects third parties. While respondent urges that this is not a problem because the courts can distinguish between an "external restraint of trade" and an "external effect" incidental to internal decisionmaking,[26] this is a distinction without a difference, because every treble damage plaintiff, as in the present case, will treat every decision as having the effect of restraining trade.

Respondent's proposed test is similar to that advanced by the Report of the Attorney General's National Committee to Study the Antitrust Laws, which "disapprove[d] any application of [the intra-enterprise conspiracy] doctrine to joint action between members of a corporate family not intended to or resulting in *coercive* undue restraint on their customers or competitors."[27] Like respondent's approach, this standard reflects a difference in words that produces no difference in result. The majority of intra-enterprise agreements are likely to have some effect on third parties. Emphasis on the effect on third parties ignores the fact that Section 1 permits a host of single firm actions that adversely affect third parties. How does one determine if the effect is "coercive" or not? What is the basis for holding that behavior having the same effect is lawful when engaged in by a company with its divisions, but is unlawful when engaged in by a parent and its wholly-owned subsidiary? By what alchemy does a lawful unilateral refusal to deal become coercive when the intra-enterprise fiction is invoked?

Nor does the "all the facts and circumstances" test which the Seventh Circuit sought to apply below provide a more satisfactory approach. As the court of appeals itself recognized, the rule is necessarily uncertain because it involves the presence or absence of various unranked factors, which are not set in concrete. *Copperweld,* 691 F.2d at 318. The jury is given free rein to consider a whole host of variables which makes it

26 Respondent's Brief In Opposition, at 17 n.12.

27 Report of the Attorney General's National Committee to Study the Antitrust Laws, 35 (1955) (emphasis added).

virtually impossible to predict what facts will satisfy the test. The resulting uncertainty, once again, leaves corporations at risk for antitrust liability for actions which taken by a corporation and its divisions would clearly be lawful. Moreover, the way to avoid liability under the test is to impose tight controls over the subsidiary, which may well destroy the very reasons for having the subsidiary in the first place: a reasonable degree of autonomy in the subsidiary's operation. In addition, the test will not encourage independence of action on the part of subsidiaries, which presumably is the very purpose of holding affiliated corporations subject to Section 1 liability, with the resultant economic loss in the operation of the modern corporation.

The "holding out as competitors" rule suffers from the same defect as the "all the facts and circumstances" test—the lack of clarity as to what criteria constitute a "holding out". Nor has any compelling rationale ever been advanced for the doctrine. It first surfaced in *Kiefer-Stewart* where the Court emphasized that the two corporations had held themselves out as competitors. 340 U.S. at 215. However, no explanation was offered as to the reason why this fact should be deemed significant. The only rationale that has been suggested is that it is somehow deceptive for corporations which are affiliated to hold themselves out as competitors if they do not in fact compete.[28] Yet none of this Court's decisions, nor those of any of the lower courts in the intra-enterprise conspiracy area, has suggested that the public was deceived or that eliminating deception was the object of the lawsuit or, indeed, of Section 1. To the extent that there may be circumstances in which corporations are unfairly attempting to gain a competitive advantage by concealing their affiliation with a subsidiary, Section 5 of the FTC Act, 15 U.S.C. § 45, appears to provide an existing adequate remedy.[29] Nonetheless, we note that if this Court should now

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28 Willis & Pitofsky, Antitrust Consequences Of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20, 37-38 (1968).

29 *See, e.g.*, FTC v. A.A. Berry Seed Co., 2 F.T.C. 427 (1920); FTC v. Armour & Co., 1 F.T.C. 430 (1919); FTC v. Fleischmann Co., 1 F.T.C. 119 (1918).

interpret the holdings of *Kiefer-Stewart* and *Perma Life* to apply only where corporations have held themselves out as competitors, the verdict below, and in Kaiser's case, must be reversed. Copperweld is a conglomerate that does not compete with Regal. Kaiser and KASCI were a vertically integrated enterprise which did not compete with each other. In neither case is there any evidence that the companies ever made any representation to the public that they competed with their subsidiaries.

In sum, none of the tests provides any sure guidance to predict in advance what structural relationship between a parent and its wholly-owned subsidiary will survive antitrust scrutiny.

There is no basis for injecting uncertainty into the structural organization and arrangements of business entities, which is the consequence of the present state of intra-enterprise conspiracy law. The law should be crystal clear so that businesses can determine on sound economic grounds the form their organization should take—rather than to be in the parlous condition under present law where in a suit in one circuit, the parent and subsidiary may be held incapable of conspiring while in actions in other circuits they may be held liable for treble damages for exactly the same conduct. This hardly is the way to breed respect for the law or to discourage the unnecessary burgeoning of litigation in the federal courts.

The simple and dispositive fact is that there is no rational basis for the intra-enterprise conspiracy doctrine. What sense is there to attempt to use Section 1 to require independent behavior when a corporation may lawfully avoid the rule by eliminating any semblance of independence by the device of converting its subsidiary to a division? If the ownership of one corporation by another is the result of an acquisition, as opposed to internal growth, it may be challenged under Sections 1 and 2 of the Sherman Act or under Section 7 of the Clayton Act, 15 U.S.C. § 18. If the resulting concentration is lawful because it does not unreasonably restrain trade, is not an attempt to monopolize, does not create unlawful monopoly power or substantially lessen competition, then it is entirely

artificial to hold that the manner in which the parent chooses to exercise control over the subsidiary has antitrust consequences.[30]

II. Nothing In The Legislative History Of The Sherman Act Or In This Court's Early Decisions Interpreting The Act Requires A Result Different Than That Which Petitioners Request Here.

Respondent contends that the intra-enterprise conspiracy doctrine is supported by the legislative history of the Sherman Act.[31] Neither its references nor the entire legislative history of the statute provide any support for this extraordinary assertion. On the contrary, the legislative history indicates quite clearly that what concerned Congress was the cartel-like combination of pre-existing businesses or their combination under common ownership, with aggregations of monopoly power strangling trade and commerce. Congress was not concerned with the need to regulate or outlaw parent-subsidiary relations or those of affiliates.[32] Indeed, the modern corporations with multiple divisions and subsidiaries did not even exist at that time.

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30 Thus while both the court of appeals below, *Copperweld*, 691 F.2d at 318-20, and respondent, Respondent's Brief In Opposition at 16, urge that the jury's verdict is rational because the record indicates that petitioners used their combined economic power to exclude Independence from the market, they ignore the fact that it would have been perfectly lawful under the Sherman Act for Copperweld, had Regal been a division, to have exercised the same amount of market power. Indeed, if the same conduct occurred while Regal was a division of Lear Siegler, there would have been no liability.

31 Respondent's Brief In Opposition at 9; Respondent's Supplemental Brief In Opposition at 4, 8.

32 Senator Sherman himself stated that he was "not opposed to combinations in and of themselves" and did "not care how much men combine fo proper objects. . . ." 21 Cong. Rec. 2569 (1890), *reprinted in* E. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes, 177 (1978). Senator Sherman was concerned about combinations that "[embrace] the great body of all the corporations engaged in a particular industry. . . ." 21 Cong. Rec. 2457 (1890), Kintner at 117.

Respondent's second argument is that the rule of *Kiefer-Stewart* and *Perma Life* finds support going back as far as the *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904) and *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911) cases. This is not so. In both cases, at issue was the trust or holding company device, which had been employed as a means of avoiding the contract, combination or conspiracy provisions of Section 1 of the Sherman Act. In both cases, the holding companies at issue were the product of the merger of previously separately owned companies which, when combined under common ownership, substantially lessened competition or achieved monopoly power. This is a far cry from *Kiefer-Stewart* and *Perma Life* where there was no allegation that either defendant achieved monopoly power by acquiring its subsidiaries or combining with them.

Finally, respondent contends that petitioners seek an exemption from the antitrust laws which only Congress, not this Court, can provide. Once again, there is no support for this position. First, the rule that petitioners and *amici* urge this Court to adopt would in no way exempt companies operating subsidiaries from liability under the Sherman Act. Section 1 could still be invoked, along with Section 2 of the Sherman Act and Section 7 of the Clayton Act, by the Government or private parties, to challenge combinations and acquisitions which unreasonably restrain trade, constitute monopolization or substantially lessen competition. All the rule petitioners urge would do is provide that corporations that have lawfully acquired other companies or extended their operations through newly created subsidiaries should not be subject to Section 1 liability for choosing to do business through subsidiaries rather than divisions.

Second, it is noteworthy that despite respondent's position that only Congress, not this Court, is free to clarify the law of intra-enterprise conspiracy, it nevertheless has itself urged the Court to do so. Thus, as we have previously noted, respondent does not urge the Court to affirm the literal view of intra-enterprise conspiracy suggested by *Kiefer-Stewart* and *Perma*

Life. Clearly, if the Court is free to refine its prior holdings as is suggested by respondent, it is also free to reject the doctrine once and for all. In so ruling, the Court would do no more than that which numerous lower courts have done in agonizing over how to apply *Kiefer-Stewart* and *Perma Life* to the cases before them and in so doing developed at least five distinct lines of authority. Far from creating an "exemption," such an approach would merely constitute judicial recognition that Congress did not intend to outlaw intra-enterprise joint conduct when it enacted Section 1 of the Sherman Act.

CONCLUSION

The Court should reaffirm the basic principle of antitrust, which is to protect market competition from restraints imposed by two or more separately owned and managed companies and from attempts to monopolize and monopolization by one or more companies. The Court should hold that a parent and its wholly-owned subsidiary, and affiliated corporations wholly owned by the same parent, are incapable of conspiracy under Section 1 of the Sherman Act as a matter of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

COPPERWELD CORPORATION, ET AL., PETITIONERS

v.

INDEPENDENCE TUBE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

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QUESTION PRESENTED

Whether joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, should be subject to liability under Section 1 of the Sherman Act, 15 U.S.C. 1.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

On March 21, 1983, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a brief supporting petitioners as to the first question presented,[1] and on June 20, 1983, the Court granted the petition for a writ of certiorari, limited to the first question presented.

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[1] Contrary to respondent's contention (Supp. Br. in Opp. 2), our earlier submission did not "concede[] that the activities of petitioners here resulted in an unreasonable restraint of trade to the ultimate detriment of consumers." Rather, we simply expressed the view that the second question presented by the petition did not warrant review by this Court. See U.S. Amicus Br. 3-4 n.8.

This case raises the question whether joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, should be subject to liability under Section 1 of the Sherman Act, 15 U.S.C. 1. The United States and the Federal Trade Commission have primary responsibility for enforcement of the federal antitrust laws. They therefore have an interest in assuring that the Sherman Act is construed and applied in a manner that most effectively advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

The court below upheld a jury finding that petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, conspired to restrain trade in the structural steel tubing market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent Independence Tube Corporation, plaintiff below, alleged that joint actions of the petitioners caused a third company (Yoder) to cancel its contract to provide respondent with a tubing mill, and that as a result respondent was unable to enter the structural steel tubing market until some nine months later than if Yoder had not cancelled the contract.[2] In affirming the jury verdict, the court of appeals relied on a line of this Court's decisions[3] for the proposition that a parent corporation and its wholly-owned subsidiary may be treated as separate entities capable of conspiring within the meaning of Section 1 of the Sherman Act (Pet. App. A10-A11 & n.8). Re-

[2] Respondent originally contended that Yoder had conspired with petitioners, but the jury found that Yoder had not participated in a conspiracy (Pet. App. A6).

[3] These decisions include *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

ferring to a list of factors set out in one of its prior decisions,[4] the court of appeals concluded that the evidence supported the jury's conclusion that petitioners were sufficiently separate from each other to be subject to Section 1 liability for their joint activities (*id.* at A11-A17, A40-A42).

SUMMARY OF ARGUMENT

The court below held that concerted action by petitioners—a parent and its wholly-owned subsidiary—is subject to Section 1 of the Sherman Act, 15 U.S.C. 1, relying on what has come to be known as the "intraenterprise conspiracy doctrine." We urge the Court to reassess that doctrine and to hold that when common ownership and control of two corporations is itself lawful, the mere fact that those corporations coordinate their activities will not subject them to Section 1 liability.

1. The basic question in reassessing the intraenterprise conspiracy doctrine is whether joint activities of commonly owned and controlled companies should be subject to Section 1 of the Sherman Act, or only to Section 2 of the Act, 15 U.S.C. 2. Congress and the courts have articulated distinct standards applicable to various types of business conduct under the Sherman Act. The least intrusive standard is applied to unilateral, or single firm, conduct. Such conduct is subject only to Section 2, which is not violated unless a firm's market power is such that its conduct would create at least a dangerous probability of monopolization. Concerted conduct is subject to the stricter standard of Section 1, which prohibits conduct that creates an unreasonable restraint of trade. In applying Section 1, the courts have developed a further distinction. Concerted conduct that involves, for example, the creation or transfer of productive units (*e.g.*, a merger) is judged according to the "rule of rea-

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[4] *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980).

son," under which courts examine market power and market structure to determine whether the adverse effects of a combination are unlikely to outweigh its benefits. Concerted conduct that directly eliminates horizontal competition and involves no joint production or distribution activity is judged under a standard of per se illegality.

These distinctions are based on common sense and sound economic reasoning. It is appropriate to apply the least intrusive standard to unilateral conduct, because such conduct does not directly eliminate independent economic decision making and because it is often difficult in practice to distinguish between desirable "hard" competition and predatory conduct that will decrease consumer welfare in the long run. Concerted conduct merits more careful scrutiny because it always reduces the number of independent economic decision makers. If a combination involves, *e.g.*, the creation or transfer of productive units or contractual reallocation of functions, some overall consumer benefit may result, so that it is appropriate to conduct an economic inquiry to evaluate the probable effect of the combination. But if a combination directly eliminates competition and involves no joint production or distribution activity, prohibiting it, even in the absence of market power, preserves competition without economic loss.

2. The intraenterprise conspiracy doctrine is inconsistent with the general scheme of antitrust analysis applied by the courts because it relies on considerations of form rather than substance. Courts have held correctly that concerted action by a corporation and its officers and employees amounts to action by a single economic enterprise and thus is not subject to Section 1. Likewise, courts have properly held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions, again because they constitute a single economic enterprise.

There is no good reason to distinguish a firm's operation through separately incorporated subsidiaries from its operation through unincorporated divisions for purposes of determining the applicable standard of antitrust liability. A firm's choice to operate through subsidiaries does not change the fact that the different entities remain part of a single economic enterprise, with the controlling entity determining the extent of any "competition" among the subordinate units. The concept of "agreement" has little meaning in the context of commonly owned and controlled corporations; a controlling parent always has the power to achieve the ends it desires by directing the actions of subordinate units, so that, unlike the situation of two separate firms, agreement does not eliminate a potential for independent decision making.

Courts and enforcement agencies treat commonly owned and controlled corporations as a single economic enterprise in other areas of antitrust, such as analysis of market power in connection with mergers and acquisitions. But the lower courts have viewed this Court's decisions as precluding a similar focus on economic substance in the case of intraenterprise "conspiracy." Although *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), the apparent source of the intraenterprise conspiracy doctrine, can be read narrowly, subsequent decisions give broader scope to the doctrine.

3. Elimination of the intraenterprise conspiracy doctrine would further the purposes of the Sherman Act. The doctrine undermines the goals of the Act by needlessly inhibiting enterprises from adopting a form of business organization that may enable them to compete more effectively. The doctrine fails to recognize that for antitrust purposes intraenterprise conduct is in substance unilateral. Under the doctrine, such conduct, which normally would be judged under Section 2 standards, may be condemned when there is no significant probability of monopolization, and, depending on the type of "agree-

ment" that is found, may even be judged under a standard of per se illegality—a standard at the opposite end of the spectrum from the standard otherwise applicable to unilateral conduct. Attempts to limit the scope of the doctrine have not adequately addressed this anomaly. Practical considerations also support a reassessment of the doctrine, which has resulted in uncertainty, confusion, and inefficiency.

A holding that joint action of commonly owned and controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's enforcement capabilities. Anticompetitive conduct by such enterprises would remain subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. In addition, the government could continue to prosecute various legal "persons" within a single economic enterprise when such "persons" conspire or otherwise violate the law in other legal contexts.

ARGUMENT

JOINT ACTIVITIES AMONG SEPARATELY INCORPORATED COMPANIES THAT ARE COMMONLY OWNED AND CONTROLLED, AND THUS ARE PARTS OF A SINGLE ECONOMIC ENTERPRISE, SHOULD NOT BE SUBJECT TO LIABILITY UNDER SECTION 1 OF THE SHERMAN ACT

The court below held that petitioners, a parent corporation and its wholly-owned subsidiary, constitute separate economic entities for purposes of Section 1 of the Sherman Act, 15 U.S.C. 1.[6] Proceeding from this prem-

[6] Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony * * *.

ise, the court concluded that the evidence supported a jury finding that petitioners' "concerted" conduct directed against respondent violated Section 1. The court's premise—that joint activities between petitioners are subject to Section 1—rests expressly on a line of this Court's decisions (see page 2 note 3, *supra*) that form the basis for what has come to be known as the intraenterprise conspiracy doctrine.

We believe this case presents an appropriate vehicle for the Court to reexamine the intraenterprise conspiracy doctrine, and we urge the Court to undertake such a reexamination. The doctrine appears to be inconsistent with the general scheme of antitrust analysis applied by the courts. By elevating form over substance, the doctrine results in analysis of what is essentially unilateral conduct under the more stringent antitrust standards designed for concerted conduct. Moreover, the doctrine has led to uncertainty and inefficiency. The Court should hold that when common ownership and control of two corporations is itself lawful, the mere fact that these corporations coordinate their activities will not subject them to Section 1 liability.

A. The Sherman Act Affords Different Degrees of Latitude to Various Types of Business Conduct, Depending on Their Probable Competitive Effects

The basic question in reassessing the intraenterprise conspiracy doctrine is whether joint activities of commonly owned and controlled companies should be subject to Section 1 of the Sherman Act, or only to Section 2 of the Act, 15 U.S.C. 2.[6] In addressing that question, it is useful to examine the manner in which the Sherman Act affords different degrees of latitude to various types of business conduct, depending on their probable effects on competition.

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[6] Section 2 prohibits monopolization and attempts to monopolize, whether by means of unilateral or joint conduct. In addition, it prohibits conspiracies to monopolize.

1. The fundamental purpose of the Sherman Act is to "preserv[e] free and unfettered competition" in the nation's economic system. *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4 (1958). The Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources." *Ibid.* The Act prohibits conduct that Congress and the courts have identified as posing a significant threat to competition. But it is also important to the objectives of the Act that it not be applied to penalize or deter conduct that promotes competition and increases consumer welfare.

Congress and the courts have recognized these dual concerns by establishing distinct standards for determining the legality under the Sherman Act of three basic categories of business conduct. The standards applied to unilateral, or single firm, conduct intrude the least on entrepreneurial discretion.[7] Unilateral conduct is subject only to Section 2 of the Act, which is not violated unless a firm's market power is such that its conduct would create at least a dangerous probability of monopo-

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[7] The basic productive unit in a market economy is the "enterprise" or "firm." Those terms generally refer to "an independent *unit* of private ownership and control over productive and potentially profit-making assets and operations." J. Bain, *Industrial Organization* 5 (1959). A single firm consists of "the total of assets and operations which is by virtue of common ownership under a single control group or management * * *. Separate enterprises [or firms] are recognized as complexes of assets and operations which are under separate ownerships and separate and independent control groups or managements, so that one management does not have the legal right or power to direct the activities of the other." *Ibid.* For a classic discussion of the firm, see Coase, *The Nature of the Firm*, 4 Economica 386 (Nov. 1937).

In our earlier submission in support of the petition, we used the term "economic entity" to refer to a firm or enterprise. Since it appears that the term "economic unit" is used by some economists to refer to subunits of a single firm (see Supp. Br. in Opp. 3 n.1), we will attempt to avoid confusion by using the terms "firm" and "enterprise," as defined above, in this brief.

lization.[8] Concerted conduct is subject to the stricter standard of Section 1 of the Act, which prohibits conduct whenever it constitutes an unreasonable restraint of trade,[9] regardless of whether it creates a danger of monopolization. Section 1 reaches only conduct in the form of contracts, combinations or conspiracies, and thus does not apply to unilateral conduct.[10]

In applying Section 1, the courts have developed a further distinction. Combinations that may increase efficiency by, for example, the creation or transfer of productive units or contractual reallocations of distribution activity (*e.g.*, mergers, joint ventures and various types of vertical agreements) are judged under the "rule of reason," under which courts consider the market power of the firms involved and the structure of the relevant

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[8] See, *e.g.*, *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977). Cf. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965).

The courts have held that some forms of less dangerous, but nonetheless anticompetitive, unilateral conduct may be subject to Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. See *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-395 (1953). In addition, state tort or contract law may provide damages and other relief for certain types of unilateral conduct that harm competitors. Indeed, in this case the jury found that petitioners had tortiously interfered with respondent's contractual rights. Pet. App. A6-A7.

[9] See *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

[10] See, *e.g.*, *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *Contractor Utility Sales Co.* v. *Certain-Teed Products Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 451 (2d Cir. 1982), cert. denied, No. 81-2301 (Oct. 4, 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 846 (10th Cir. 1981).

markets in determining whether the net effect of the combination is anticompetitive or procompetitive.[11] On the other hand, combinations that eliminate competition and promise no significant economic benefit, such as horizontal price-fixing and market allocation, are conclusively presumed to be anticompetitive and are deemed per se unlawful, without elaborate analysis of market power or market structure.[12]

2. These distinctions are based on common sense and sound economic reasoning. They further the purposes of the Sherman Act by focusing the Act's deterrent force on conduct most likely to be harmful to competition, while shielding conduct that is likely to further consumer welfare.

It is appropriate that the antitrust laws be least intrusive with respect to single firm conduct. Such conduct does not result in any direct loss of independent economic decision making. Moreover, individual firm decisions on matters such as pricing and introduction of new products provide the "hard" competition among independent enterprises that the antitrust laws are designed to foster. It often is difficult in practice, however, to distinguish between "hard" competition that benefits consumers (even if it harms rivals) and conduct that will have the long-run effect of lessening competition and consumer welfare.[13] Therefore, a relatively nonintrusive standard

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[11] See, *e.g.*, *Standard Oil Co. of New Jersey* v. *United States*, *supra*; *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 301-302.

[12] See, *e.g.*, *Northern Pac. Ry.* v. *United States*, *supra*, 356 U.S. at 5; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978).

[13] Witness the difficulties experienced by courts and commentators in trying to develop a formula for determining whether particular price reductions are socially beneficial price cuts or "predatory"

for unilateral conduct is preferable, since, if plaintiffs could recover damages under the Sherman Act for injury attributable to nothing more than "hard" competition, the incentive for firms to compete aggressively would be materially diluted, to the detriment of consumer welfare.[14]

Combinations of otherwise independent economic entities are properly subject to stricter scrutiny either under the rule of reason, or, in some cases, under a standard of per se illegality. Unlike unilateral conduct, which will have anticompetitive effects only in very limited circumstances, all combinations among otherwise independent economic entities reduce to some extent the number of independent decision makers, thus raising sufficient anticompetitive potential to merit careful scrutiny of their effects on competition.[15] In a system de-

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pricing. See, *e.g.*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); R. Posner, *Antitrust Law: An Economic Perspective* 184-196 (1976); R. Bork, *The Antitrust Paradox* 149-155 (1978); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979).

[14] In recognition of this concern, this Court has emphasized that the statutory goal is the protection of competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). Economic harm inflicted on rivals because of their inability to operate efficiently or to offer products attractive to consumers is not the sort of harm Congress intended to prevent under the antitrust laws. See, *e.g.*, *SCM Corp.* v. *Xerox Corp.*, 645 F.2d 1195, 1205 (2d Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 273; *California Computer Products, Inc.* v. *International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979).

[15] Congress's determination to impose a more stringent Sherman Act standard on concerted conduct also is consistent with the stricter standards for multiparty conduct reflected in the common law treatment of conspiracies. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961).

signed to foster multiple independent sources of economic decision making, there is little reason to tolerate concerted business conduct among rivals unless it involves an integration of resources under common control or a contractual sharing of functions that holds out the possibility of increased output, lower prices, or other procompetitive benefits that cannot be attained by individual firms.

If a transaction involves, *e.g.*, the creation or transfer of productive or distributive units—as do mergers, joint ventures, and distribution agreements—some consumer benefits in the form of increased efficiency are likely. Accordingly, it is worth analyzing whether, on balance, the anticompetitive effects of the transaction outweigh its benefits, and prohibiting only combinations that are more likely to have anticompetitive effects. However, if a combination of independent economic enterprises directly eliminates horizontal competition and involves no joint production or distribution activity, as in the case of a price-fixing agreement, nothing is lost by prohibiting it without the more detailed economic inquiry required in rule of reason cases.

B. The Intraenterprise Conspiracy Doctrine Is Inconsistent With the General Scheme of Antitrust Analysis Applied by Courts Because It Rests on Considerations of Form, Rather Than on the Recognition That Joint Conduct of Commonly Owned and Controlled Corporations Is in Substance Unilateral Conduct

The intraenterprise conspiracy doctrine is out of step with the general scheme of antitrust analysis applied by the courts because it relies on considerations of corporate form, rather than substance. Under the doctrine, economically identical conduct may be subject to either the most or the least stringent Sherman Act standard simply on the basis of an enterprise's choice of corporate form. The doctrine fails to recognize that joint conduct of

commonly owned and controlled corporations is in substance unilateral conduct.

1. This Court has stressed that the choice of antitrust standards applicable to particular conduct should turn on considerations of economic substance rather than form. See, *e.g.*, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 46-47 (1977); *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 377 (1933). The lower courts have applied this principle in concluding that certain forms of joint conduct in fact amount to unilateral conduct that is not subject to Section 1.

Section 1 prohibits any "person" from engaging in a combination or conspiracy unreasonably to restrain competition, while Section 8 of the Act, 15 U.S.C. 7, defines the term "person" to include corporations and associations, as well as individuals. Thus, if applied literally, Section 1 could be invoked against joint conduct among a firm and its officers or employees, or between two officers cooperating on behalf of their firm. However, the courts have avoided such a formalistic approach and have properly recognized that in a complex economy the relevant economic unit is likely to be larger than a single individual. The courts uniformly have held that although a corporation and its officers and employees are separate legal persons, concerted action among them amounts to action by a single economic enterprise and therefore does not violate Section 1.[16] The rationale for

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[16] See, *e.g.*, Pet. App. A9; *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, *supra*, 575 F.2d at 286-287; *Dussouy* v. *Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981); *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F.2d 911, 913-914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962); *Morton Buildings of Nebraska, Inc.* v. *Morton Buildings, Inc.*, 531 F.2d 910, 916-917 (8th Cir. 1976); *Schwimmer* v. *Sony Corp. of America*,

this approach is that "[a] corporation can act only through its employees, and if an agreement between a corporation and an employee could be a Sherman Act conspiracy, the plurality requirement [of Section 1] would lose all meaning." *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978).[17] For similar reasons, the courts have properly held Section 1 inapplicable to concerted action by a corporation and its unincorporated divisions. The divisions are part of a single economic enterprise, as well as a single legal unit, and "[t]reble damages should not be assessed against a corporation merely because it has adopted an organizational division of labor • • •." *Id.* at 244.[18]

2. There is no good reason to distinguish a firm's operation through separately incorporated subsidiaries from its operation through unincorporated divisions for purposes of determining the applicable standard of antitrust liability. Antitrust analysis rests on the basic assumption that a firm will organize and use its productive assets

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677 F.2d 946, 953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 893-894 (3d Cir.), cert. denied, 454 U.S. 893 (1981). The courts recognize an exception to this principle in the case of an individual who conspires with the corporation to further his own interests and thus is not acting on behalf of the corporation. See, *e.g.*, *H & B Equipment Co.*, *supra*, 577 F.2d at 244; *Morton Buildings of Nebraska, Inc.*, *supra*, 531 F.2d at 916-917.

[17] See also, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, *supra*, 200 F.2d at 914 (corporation does not violate Section 1 when it exercises its right to select customers and to refuse to sell its goods through its officers and agents, "which is the only medium through which it can possibly act"); *Dussouy* v. *Gulf Coast Investment Corp.*, *supra*, 660 F.2d at 608.

[18] See also, *e.g.*, Pet. App. A9; *Spectrofuge* v. *Beckman Instruments*, *supra*, 575 F.2d at 287; *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors Ltd.*, *supra*, 416 F.2d at 83-84; *Poller* v. *Columbia Broadcasting System, Inc.*, 284 F.2d at 603.

so as to maximize its total profits.[19] In doing so, the firm may decide to operate through divisions or through separately incorporated subsidiaries, and it may or may not grant the divisions or subsidiaries a considerable degree of operational independence. In some cases, divisions or subsidiaries may appear to "compete" with one another or with the parent. Despite this appearance, subdivisions that are under common ownership and control cannot properly be viewed as "independent" enterprises or "competitors" in an economic or antitrust sense; rather, they remain part of a single economic enterprise.[20] The relationship between them will be the result primarily of management decisions rather than market forces.[21] The controlling entity will determine the extent of any "competition" or operational "independence" of the subordinate units based on its conclusions about how best to maximize the profits of the aggregate enterprise—an objective that may be inconsistent with maximizing competition among the commonly controlled units.[22] Any

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[19] See generally, *e.g.*, L. Sullivan, *Antitrust* 22-23 (1977); R. Posner & F. Easterbrook, *Antitrust: Cases, Economic Notes, and Other Materials*, 4-11, 728-729, 1060-1069 (2d ed. 1981); 2 P. Areeda & D. Turner, *Antitrust Law* 267-281 (1978).

[20] The fact that a parent and its subsidiaries are "held out" as, or appear to the public to be, competitors does not provide an antitrust policy reason to treat them as independent economic decision makers. Basing liability on a "holding out" theory suggests that some misrepresentation causes injury to the public. But none of this Court's Section 1 decisions that mention the public appearance of independence as a reason for treating commonly owned and controlled firms as independent decision makers (see pages 19-20, *infra*) suggests that the public was deceived or that deception concerning common control of corporations implicates the policies that led Congress to impose stricter standards on multiparty conduct than on actions of a single economic decision maker.

[21] See Posner & Easterbrook, *supra*, at 729-730.

[22] For an economic analysis of decision making involving commonly owned and controlled units within a single firm, see, *e.g.*, Hirshleifer, *Economics of the Divisionalized Firm*, 30 J. Bus. 96 (1957).

"concerted" activity by a parent and a subsidiary it owns and controls is in substance no different from the joint activities of a company and its unincorporated divisions or a company and its officers.

Moreover, the concept of "agreement," which is central to Section 1, has little meaning in the context of commonly owned and controlled corporations. While an agreement between two separate firms reduces or eliminates the possibility of independent economic decision making, no such possibility exists within a single firm. A controlling parent has the power to achieve the ends it desires by directing subordinate units to take certain action; a subsidiary in turn can act only within limits set by the controlling parent. Thus, even if there appears to have been conscious agreement between commonly owned and controlled units, such an agreement would not have any competitive significance, because it does not eliminate previously independent centers of decision making.

3. Courts and enforcement agencies treat commonly owned and controlled companies as a single economic enterprise under various provisions of the antitrust laws, based on the recognition that formal corporate structure of an enterprise is irrelevant to issues of anticompetitive effect. For example, parent corporations and separately incorporated subsidiaries are considered as one for the purpose of determining market power in Section 2 cases.[23] In addition, the assets and sales of corporate subsidiaries are analyzed as if they were parts of a single firm in determining whether an acquisition would be illegal under Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18, because of a resulting increase in concentration of market power.[24] Under Federal Trade Commission reg-

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[23] See, *e.g.*, *United States* v. *Grinnell Corp.*, 384 U.S. 563, 567 (1966); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1345, 1348 n.33 (D.D.C. 1981).

[24] For example, the Department of Justice Merger Guidelines (2 Trade Reg. Rep. (CCH) ¶ 4500 (June 14, 1982)) focus on the

ulations implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. (& Supp. V) 18a, an acquisition made through a separate subsidiary is subject to the premerger reporting requirements of the Act to the same extent as an acquisition made directly by the parent; in addition, the regulations expressly define as a single "person" all entities under common control.[25]

4. Despite their focus on economic substance in dealing with joint conduct involving corporate officers and divisions, and in analyzing commonly owned and controlled corporations in some contexts, and their acknowledgment that "as a practical matter, there may be little difference between a wholly-owned subsidiary and a fully integrated division" (Pet. App. A9), the courts of appeals have construed this Court's decisions as requiring —at least in some situations—the application of Section 1 standards to joint action by separately incorporated parts of the same economic enterprise. See, *e.g.*, Pet. App. A9-A11. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), is generally recognized as the source of this intraenterprise conspiracy doctrine.

The violation alleged in *Yellow Cab* included the consolidation under single control of formerly independent corporations as a means of effectuating an illegal agreement not to compete. 332 U.S. at 229.[26] In this context,

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market shares of "firms" (the economic units), rather than "corporations."

[25] 16 C.F.R. 801.1(a)(1), 801.2. Mergers of commonly owned and controlled corporations will not lessen competition, because they do not alter ownership and control. For this reason, creation of, or mergers among, wholly-owned subsidiaries of the same parent are expressly exempted from the Commission's premerger notification rules. See 16 C.F.R. 802.30.

[26] Defendants had obtained "86% of the Chicago market [for sale of taxicabs], 15% of the New York City market, 100% of the Pittsburgh market and 58% of the Minneapolis market." 332 U.S. at 224. The Court viewed the complaint as alleging that these market shares had been achieved " 'by deliberate, calculated purchase for control.' " *Id.* at 227-228 (quoting *United States* v. *Read-*

the Court rejected the suggestion that a restraint illegal under Section 1 could not result from "a conspiracy among those who are affiliated or integrated under common ownership" (*id.* at 227); it stated that "the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the [Sherman] Act" (*ibid.*).[27] The language the Court employed was broad. However, its decision can be viewed as holding only that separately incorporated, commonly controlled corporations are subject to Section 1 if the agreement at issue has the purpose or effect of bringing formerly independent corporations under common ownership, thereby restraining competition.[28]

The Court applied and expanded its *Yellow Cab* statements in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S.

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ing Co., 253 U.S. 26, 27 (1920)). The complaint in *Yellow Cab* also alleged that the combination constituted a conspiracy to monopolize in violation of Section 2 of the Sherman Act.

[27] The Court further stated that "the fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S. at 229.

[28] Some commentators have suggested this reading of *Yellow Cab*. See, *e.g.*, Handler & Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), *reprinted in* Pet. App. I. The cases cited by the Court in *Yellow Cab* (see 332 U.S. at 227-228) seem to support this reading. *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360-361, 376-377 (1933), involved formation of a joint selling agency. In *United States* v. *Reading Co.*, 253 U.S. 26, 57 (1920), the restraint identified by the Court arose from acquisitions by a holding company that gave it control of competing railroads and coal companies. And in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189 (1944), the Court upheld a divestiture decree on the ground that "the *creation* of the combination is itself the violation" (emphasis added).

134 (1968). In *Timken Roller Bearing Co.* the alleged violations included acquisitions of partial ownership interests in horizontal competitors and agreements among those corporations to fix prices and allocate territories. Justice Black there noted that the ownership interests "were obtained as part of a plan to promote the illegal trade restraints" (341 U.S. at 600) and characterized the resulting intercorporate relationship as "the core of the conspiracy" (*id.* at 601). Thus, *Timken* resembles *Yellow Cab* in that the result the Court reached could have been justified on the ground that the acquisitions themselves implemented illegal agreements between formerly independent firms and for that reason constituted an unlawful restraint.

However, in *Kiefer-Stewart Co.* and *Perma Life Mufflers, Inc.*, the Court applied the broad language of *Yellow Cab*, rather than what can be viewed as its more limited holding, to find Section 1 violations by commonly owned corporations in cases in which the alleged violations did not include a combination of formerly independent enterprises.[20] Indeed, in *Kiefer-Stewart* the Court applied

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[20] In *Kiefer-Stewart*, the Court found that commonly owned corporations had entered into an illegal conspiracy to fix maximum resale prices. It rejected defendants' argument that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." 340 U.S. at 215. It was the Court's view that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws" (*ibid.*, citing *United States* v. *Yellow Cab Co.*, *supra*). The Court added, without explanation, that "[t]he rule is especially applicable where, as here, respondents hold themselves out as competitors" (*ibid.*). Compare note 20, *supra*.

In *Perma Life*, the Court held that certain sales agreements between a parent corporation and its wholly owned subsidiary violated Section 1. (The Court also read the complaint as charging conspiracies outside the group of affiliated corporations, 392 U.S. at 142, but its holding was not confined to those external conspiracies.) No acquisition was involved, and again the Court offered no

the per se standard of illegality to conduct that, if it had been recognized as unilateral, would have been entirely legal. In neither of the decisions did the Court refer to the significance of the distinction between the legal standards applied to unilateral and concerted conduct under the Sherman Act; nor did it mention any economic considerations indicating that there would have been significant competition among the entities under common ownership and control in the absence of the challenged agreements.[30]

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explanation for the decision to impose Section 1 liability, other than that the defendants had "availed themselves of the privilege of doing business through separate corporations, [and] the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." 392 U.S. at 141-142, citing *Timken Roller Bearing Co.* v. *United States*, *supra*, 341 U.S. at 598, and *United States* v. *Yellow Cab Co.*, *supra*, 332 U.S. at 227.

[30] In at least one case, however, the Court has recognized that ownership and control can be more significant than separate legal identity. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court held that where 12,000 growers had organized into three separate legal entities, those commonly owned entities should be deemed a single organization, so that their dealings with each other were shielded from antitrust liability by the Capper-Volstead Act.

The Court's most recent reference to the intraenterprise conspiracy notion was in *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975). There the Court, citing *Yellow Cab*, *Kiefer-Stewart*, *Timken*, and *Perma Life*, stated that "even commonly owned firms must compete against each other, if they hold themselves out as distinct entities." 422 U.S. at 116. The United States in *Citizens & Southern* also cited the intraenterprise conspiracy decisions in support of its contention that the so-called "five-percent banks" should not be treated as if they were de facto branches of C&S for Sherman Act purposes (Brief for the United States at 30). However, contrary to respondent's contention (Supp. Br. in Opp. 4-5), the United States' allegation that affiliated corporations violated Section 1 was not based on a theory of conspiracy among corporations within a single enterprise. Rather, the government pointed out that the alleged corporate parent owned only five percent of the stock of the smaller banks and was prohibited by state law from owning or controlling more. In that context, the

C. Elimination of the Intraenterprise Conspiracy Doctrine Would Further the Purposes of the Sherman Act

We urge the Court to reexamine the intraenterprise conspiracy doctrine, as developed in *Yellow Cab* and its progeny, and to hold that agreements between or among commonly owned and controlled corporations[31] constituting a single economic enterprise are not subject to liability under Section 1 of the Sherman Act. Such a holding would advance the Sherman Act policy of imposing less intrusive strictures on unilateral business conduct than on concerted conduct by otherwise inde-

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government contended that the smaller banks were not subordinate units of C&S by virtue of ownership, but were controlled by it only through the very agreements at issue. Accordingly, the government contended that the five-percent banks should have been viewed as legally and economically distinct decision makers fully subject to Section 1 if they agreed with C&S to fix prices or restrain competition in some other manner (Brief for the United States at 24-25, noting that C&S lacked the power legally to require the smaller banks to conform their competitive behavior to its wishes). However, the Court held that C&S's "de facto" branching through the five-percent banks was procompetitive and that no illegal agreement among the banks had been proved. 422 U.S. at 114, 117-120.

[31] In referring to commonly controlled corporations, we mean those corporations under common ultimate legal control through ownership of voting stock. Control of one corporation by agreement with another corporation in the absence of common ownership should remain subject to Section 1.

In the case of a parent corporation and its wholly-owned subsidiary, it is clear that the parent, through ownership of voting stock, has ultimate control of the productive assets of the subsidiary. Two wholly-owned subsidiaries of the same parent also would be commonly controlled. Common control could exist in the case of substantial partial ownership as well; in the case of ownership of more than 50% of a subsidiary's stock it may be appropriate (and it would serve judicial economy) to presume that there is common control. However, an agreement between two independent corporations that have partial ownership interests in a third corporation should be viewed as concerted action under Section 1.

pendent entities.[32] It also would eliminate the uncertainty and inefficiency that have resulted from the intraenterprise conspiracy doctrine.

1. The formalistic approach of the intraenterprise conspiracy doctrine fails to recognize that for antitrust purposes intraenterprise conduct is in substance unilateral. Thus, the doctrine is inconsistent with the statutory framework of distinct standards for unilateral and joint conduct and the sound economic policy that framework reflects (see pages 8-12, *supra*). Application of the doctrine can constrain single enterprises in their competitive efforts through the threat of antitrust liability, even where there is no significant probability of monopolization. Indeed, in some cases application of the doctrine can have the drastic consequence of transmuting otherwise legal conduct into conduct that is per se illegal. For example, in *Kiefer-Stewart*, pricing decisions that would have been legal if regarded as unilateral were analyzed as if they constituted conduct at the opposite extreme of the antitrust spectrum, *i.e.*, they were found to be per se illegal under Section 1 conspiracy standards.

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[32] Even if one believed that Section 2 of the Sherman Act should be applied more broadly, *i.e.*, to reach unilateral conduct that restrains trade, but does not raise a danger of monopoly, there would be no reason to impute to Congress an intent to apply a stricter standard only to those enterprises that organize themselves into separate subsidiaries.

Contrary to respondent's contention (Br. in Opp. 8, 19-25; Supp. Br. in Opp. 3, 7-8), a holding by this Court that commonly owned and controlled corporations cannot "conspire" in restraint of trade within the meaning of Section 1 would not amount to a judicially created "antitrust exemption." Rather, like the courts' treatment of intracorporate activity involving officers, employees, and unincorporated divisions, it would simply recognize that joint conduct within a single economic enterprise is not the sort of concerted action Congress intended to subject to the strictures of Section 1. As we make clear in the text, such conduct would still be subject to Section 2 of the Act.

Efforts to temper the effect of the intraenterprise conspiracy doctrine have been largely unsuccessful.[33] The Seventh, Eighth and Ninth Circuits have sought to narrow the scope of the doctrine somewhat by limiting it to situations in which a parent and subsidiary appear to operate more in the manner of independent entities than as a single firm.[34] Those circuits employ a multifactor analysis that requires consideration of numerous aspects of the operating relationship between the affiliated corporations, with the relative weight and importance of the factors left to the factfinder to determine "how much separation [the companies] in fact maintained in the conduct of their business" (Pet. App. A16).[35] Respondent also would limit the scope of the doctrine. Under respondent's theory, which might be described as an "external restraints" test, Section 1 would apply to intraenterprise conduct only in cases in which the companies not only maintain some degree of operational independence, but also engage in joint conduct that disadvantages the trade of third parties (Br. in Opp. 15-16).[36]

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[33] See Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 668-676 (1982).

[34] See, *e.g.*, *William Inglis & Sons Baking Co.*, v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-1055 (9th Cir. 1981), cert. denied, No. 81-2083 (Oct. 4, 1982); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588-589 (8th Cir. 1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 726 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); Pet. App. A11.

[35] For example, the jury here was instructed to determine whether "the two companies, in fact, operated as separate entities" by considering the companies' histories; whether they had separate staffs and offices; whether the parent paid the subsidiary's expenses; the extent of the subsidiary's policymaking independence; the extent of the subsidiary's outside sales; whether the companies had separate records and accounts; whether they were "separate participants" in the alleged unlawful acts; whether the companies had separate officers and directors; and "any other facts that you find that are relevant." Pet. App. A40-A41.

[36] Such an approach has been articulated from time to time as a means of limiting the scope of this Court's broad language in

But neither the "all factors" test employed by the courts below nor the "external restraints" test advocated by respondent presents an adequate solution. Such tests fail to recognize that even if there is a general pattern of operational independence, it does not evidence the existence of independent economic enterprises, but rather essentially unilateral management decisions by the controlling entity. Similarly, existence of an effect on third parties does not overcome the fact that agreements among commonly owned and controlled corporations do not involve the aggregation of economic power that engenders Section 1 concerns.

It is not surprising that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical" (Pet. App. A9; footnotes omitted).[37] Petitioners and amici have cited numerous scholarly articles supporting the view that the doctrine impairs economically efficient organization and fails to advance antitrust objectives. Respondent cites authority for the proposition that this Court's decisions support an intraenterprise conspiracy challenge to conduct of a parent and subsidiary that unreasonably restrains the trade of third

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Yellow Cab and its progeny, while expanding the scope of the Sherman Act prohibition against unilateral conduct. In 1955, a majority of the Attorney General's National Committee to Study the Antitrust Laws expressed the view that Section 1 of the Sherman Act applied to concerted action by a corporate parent and its subsidiary directed against a third party even if the Section 2 criteria for an attempt to monopolize were not met. *Report* at 35. Indeed, a footnote in the 1977 *Antitrust Guide for International Operations* of the Antitrust Division of the Department of Justice (see Pet. 20-21; Br. in Opp. 14, 21) suggested that under existing law, "coercive attempts by members of a corporate group to drive third parties out of business or out of markets" would be illegal under Section 1. But the Division has not subsequently developed or pursued that suggestion in its enforcement activities and has looked instead to Section 2 criteria in such situations.

[37] See also, *e.g.*, *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 456 n.8 (9th Cir. 1979) ("the [intraenterprise conspiracy] theory has been subjected to much criticism and comment").

parties (Br. in Opp. 14-15), but it identifies no commentary to support the proposition that joint conduct by commonly owned and controlled corporations is analogous, in terms of Section 1 concerns about aggregations of economic power, to concerted action by otherwise independent firms.[38]

2. Practical considerations reinforce our view that a reassessment of the intraenterprise conspiracy doctrine is advisable. The doctrine has failed to provide the business community with clear guidance. The existing confusion and conflict among the circuits concerning the doctrine (see our earlier amicus submission at 12-14), and the number and complexity of factual issues that courts have considered in applying it (see page 23, note 35, *supra*) create difficulties for firms seeking to make efficient choices regarding corporate structure. The threat of antitrust actions alleging intraenterprise conspiracy could cause a firm to avoid separately incorporated subsidiaries, even if that organizational structure otherwise would yield lower costs and prices.[39] In addition, the pos-

[38] Respondent contends (Br. in Opp. 23-25) that a holding that joint actions by commonly owned and controlled corporations do not constitute an agreement for purposes of Section 1 of the Sherman Act would be inconsistent with other areas of the law in which separately incorporated subsidiaries are treated as distinct from the parent firm. However, subsidiary corporations are not uniformly treated as independent economic units. See, *e.g.*, 26 U.S.C. (& Supp. V) 1501-1504 (consolidated tax returns) and 26 U.S.C. 482 (Secretary's authority to allocate income and deductions among related entities). Even if they were, this would not compel a similar result under the Sherman Act, which reflects different policies and concerns from those underlying other areas of the law.

[39] Respondent contends (Br. in Opp. 22) that there is no empirical evidence that the threat of Section 1 liability has deterred separate incorporation. However, the existence of subsidiaries merely shows that some corporations are willing to take the antitrust risk; others may have been deterred from doing so. Cf. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, *supra*, 416 F.2d at 82-84 (indicating that Seagram converted its subsidiaries to divisions after this Court's *Kiefer-Stewart* decision). Moreover, the threat

sibility of treble damages awards based on intraenterprise conspiracy encourages the filing of federal antitrust suits alleging what appear to be at worst unilateral business torts that do not raise monopoly concerns.[40] Moreover, application of an "all factors" test precludes dismissal at an early stage of litigation and requires wide-ranging (and ultimately irrelevant[41]) factual inquiries.

A holding that joint action of commonly owned and controlled corporations does not, in itself, constitute an agreement within the meaning of Section 1, would not impair the government's antitrust enforcement capabilities.[42] If common control arises from acquisition, the acquisition is subject not only to Section 1 of the Sherman Act, but also to Section 7 of the Clayton Act, 15 U.S.C. (& Supp. V) 18. Anticompetitive conduct by commonly

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of Section 1 liability may constrain structuring of relationships among subsidiaries.

Respondent also notes (Br. in Opp. 22-23) that tax considerations, rather than considerations of efficiency, were apparently the motive for separate incorporation in this case. However, the responses of business entities to the incentives provided by the tax system presumably are those Congress sought to encourage; if not, they should be addressed through the tax laws without the distortion that results from the intraenterprise conspiracy doctrine.

[40] Here the "restraint" alleged is essentially an interference with contract claim. Respondent dismissed its Section 2 claims before trial (Pet. App. A6).

[41] Most of the factors considered under an "all factors" test look not to whether there are truly independent decision makers, but to how control is exercised or to whether a parent corporation has chosen to delegate considerable operational independence.

[42] As some commentators have noted, the intraenterprise conspiracy doctrine has been invoked primarily in private treble damages actions. See Pet. 14, quoting Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25. The United States has occasionally cited the Court's intraenterprise conspiracy decisions. See note 30, *supra*. However, the doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years.

owned and controlled corporations would remain fully subject to antitrust enforcement under the standards applicable to other unilateral conduct. Thus, it would be subject to Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act in appropriate circumstances.

Abolition of the intraenterprise conspiracy doctrine would not preclude prosecution of various legal "persons" within a single economic enterprise when such "persons" conspire or otherwise violate the law in other legal contexts. The mere fact that corporate officers and employees work within a single economic enterprise does not mean they cannot be co-conspirators in some types of cases. For example, it is clear that corporate officials within a single economic enterprise can conspire with each other, *e.g.*, to defraud the government and thereby violate the law. In addition, where a conspiracy among distinct economic enterprises exists, a criminal or civil action can be brought under Section 1 against responsible officials, as well as against the corporations for which they acted.[43]

3. Of course, we are aware that the Court does not lightly reevaluate its prior holdings. However, we believe such a reassessment would be proper in this case. The intraenterprise conspiracy notion derives from this Court's prior decisions (see pages 17-20, *supra*); it is entirely appropriate for the Court to reexamine those decisions if it concludes that "the need for clarification of the law in this area justifies reconsideration." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, *supra*, 433 U.S. at 47. The Court's determination in *GTE Sylvania* to reexamine its prior decision in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was prompted by

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[43] The cases cited by respondent in its Supplemental Brief in Opposition (at 5) are ones in which affiliated corporations were named as co-conspirators in connection with alleged combinations involving other, distinct economic enterprises. Thus, they do not rely on a theory of conspiracy solely between affiliated corporations.

its recognition that "*Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts * * * have sought to limit its reach." 433 U.S. at 47-48 (footnotes omitted). The Court in *GTE Sylvania* also recognized that reexamination was warranted because the *Schwinn* holding was inconsistent with economic principles underlying the antitrust laws. See 433 U.S. at 51-59.

As we have shown, a judicial reassessment of the intraenterprise conspiracy doctrine is appropriate for essentially the same reasons articulated in *GTE Sylvania*. We urge the Court to hold that joint activities among separately incorporated companies that are commonly owned and controlled, and thus are parts of a single economic enterprise, are not subject to liability under Section 1 of the Sherman Act. Such a holding would confine the application of Section 1 to combinations of formerly independent economic enterprises, while continuing to subject intraenterprise conduct to Section 2, consistent with the system of Sherman Act standards established by Congress and the courts; it would provide increased certainty in the application of the antitrust laws; and it would allow firms to make decisions about their internal organization without incurring the risk of treble damages liability for unilateral conduct that does not amount to a Section 2 violation.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-1260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

I. This Court Should End The Confusion And Unsound Results Generated By The Intra-Enterprise Conspiracy Doctrine.

The "disarray" produced by the intra-enterprise conspiracy doctrine is not, as respondent would like this Court to believe, a "contriv[ance]" of petitioners. (Brief in Opposition, hereafter "Resp. Br.," 19) The characterization is taken from Professor Sullivan's *Handbook of the Law of Antitrust* (1977), which is repeatedly relied on by respondent and which flatly states that "[t]he cases, commentary and settled practices are in disarray." (*Id.* at 323)

His views are shared by the courts, other leading commentators and the *amici*. *See, e.g., Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 533 F.2d 620, 625 (9th Cir. 1977) (the doctrine has led to "an unresolved conceptual blur when applied to the variant fact situations presented by diverse

economic entities and functional structures"); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 21 (1968) (the "net result [of the doctrine] is thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts"); Amicus Brief of National Association of Manufacturers, p. 3 (the "lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations").[1]

Nothing supports respondent's suggestion that the more recent cases have eliminated the "conflict among the circuits." (Resp. Br. 15-19) Of the intra-enterprise decisions listed in Appendix H to the Petition, over 125 have been handed down in the last decade and no common thread is discernible. Since the Appendix was compiled, another ten cases have been reported, and the confusion continues.[2]

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[1] Contrary to respondent's claim, there is nothing "artificial" in petitioners' assertion that "[a]t least five divergent tests" have been applied by the lower courts. (*Contrast* Resp. Br. 15 *with* Pet. 10) The recent article by Handler & Smart, cited by the court of appeals and reproduced in Appendix I, makes precisely the same five-fold classification. (3 Cardozo L. Rev. 23, 38-61; App. I-24 to I-59) *See also* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661, 668-76 (1982), adopting a similar classification.

[2] Four of these cases discuss the doctrine directly. *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983); *General Business Systems* v. *North American Philips Corp.*, 1982-83 Trade Cas. ¶ 65,177 (9th Cir. 1983); *Loube* v. *Chrysler Corp.*, 1982-83 Trade Cas. ¶ 65,098 (D. Md. 1982); *Damon Corp.* v. *Geheb*, 1982-83 Trade Cas. ¶ 65,117 (N.D. Ill. 1982). *See also Litton Systems, Inc.* v. *AT&T*, 1982-83 Trade Cas. ¶ 65,194 (2d Cir. 1983); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494 (3d Cir. 1982); *D&S Redi-Mix* v. *Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982); *Williamsburg Wax Museum, Inc.* v. *Historic Figures, Inc.*, 1982-83 Trade Cas. ¶ 65,202 (D.D.C. 1982); *Turner* v. *Johnson & Johnson*, 549

(footnote continued on next page)

Especially notable is the recent opinion by a different panel of the Seventh Circuit in *University Life Ins. Co.* v. *Unimarc, Ltd.*, 1982-83 Trade Cas. ¶ 65,139 (7th Cir. 1983). Not only does the panel (in an opinion by Judge Posner) make no mention of the *Copperweld* case, but it appears to resuscitate the "holding out as competitors" test:

> "[T]he complaint does not allege that the affiliates, despite being owned in common, hold themselves out as competitors, as is probably required for a conspiracy among affiliated companies to be a per se violation of the antitrust laws." (*Id.* at p. 71,463; citing *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116 (1975))

Judge Posner's reliance on the "holding out as competitors" test dramatizes not only the conflict among, and even within, the circuits but also the practical importance of the standard applied. It is undisputed that Copperweld and Regal never were or held themselves out as competitors. (Pet. 3)

Judge Posner's decision is also significant for its citation to *Citizens & Southern* as the authority for the "holding out as competitors" test. This sharply conflicts with respondent's claim that the case endorses the "rule" that liability should be imposed on affiliated companies where their activities "restrict the trade of third parties." (Resp. Br. 13) In point of fact, no such "rule" can be found in *Citizens & Southern* or any of this Court's other intra-enterprise conspiracy cases. Instead, the "rule" derives from the attempt in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* to reconcile this Court's early decisions in *Yellow Cab, Kiefer-Stewart* and *Timken*. Although some Committee members suggested such a distinction between parent-subsidiary activities directed at "the trade of strangers" and

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(footnote continued from preceding page)

F. Supp. 807 (D. Mass. 1982); *Levicoff* v. *General Motors Corp.*, 551 F. Supp. 98 (W.D. Pa. 1982).

those of an "internal" nature, the only *consensus* the Committee was able to achieve was that:

> "It is obviously unrealistic to expect or to command wholly-owned affiliates to compete. Insofar as the decision in *Kiefer-Stewart,* or the decree in *Timken* may be considered to rest on such a hypothesis, we recommend that the Supreme Court reconsider it. While the decision on illegality in both cases can be otherwise justified, we believe the remedy provided in the *Timken* case, requiring competition among companies now fully controlled by American Timken, sacrifices substance to form." (*Report* at 36)

Respondent's "rule" was likewise not accepted below. The district court's jury instructions—which were expressly adopted by the Seventh Circuit (691 F.2d at 318-19, 331-32; A-13, 40-41)—made no mention of "restraint on third parties" as a factor to be considered in deciding the capacity to conspire issue. To the extent the standard has been applied in some cases, it has been criticized as "unworkable and unreal" in others. *See Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 n.20 (8th Cir. 1981). As Handler & Smart explain:

> "The fundamental problem with the standard is that the majority of intracorporate agreements are likely to have some effect on third parties. For example, a parent's decision that its subsidiary should lower its prices to increase volume may well take business away from competitors who could claim that the pricing decision was aimed at outsiders and adversely affected them. A decision by a manufacturer that its subsidiary should cut distribution costs by withdrawing from a certain geographic area or refusing to sell to certain customers will obviously have an adverse effect on the subsidiaries' customers." (3 Cardozo L. Rev. at 50-51; App. I-43; footnote omitted)

The confusion over the proper standard is further brought home by respondent's claim that the Department of Justice

has adopted an "effect on third parties" test in its enforcement activities. (Resp. Br. 13-14) By contrast, the Seventh Circuit observed that "government enforcement agencies do not use the doctrine." (691 F.2d at 317; A-9) As Handler & Smart say: "[T]he Justice Department has eschewed the doctrine in the main, as has the FTC after some flirtation with it in the early 1950's." (3 Cardozo L. Rev. at 66; App. I-66-67; footnotes omitted) This is confirmed by the numerous Justice Department consent decrees exempting activities involving a corporation and its subsidiaries from their application, even though "restrictions on third parties" may be involved. *E.g.*, *United States* v. *Beech Aircraft Corp.*, 1965 Trade Cas. ¶ 71,570 (D. Kan.) ("disciplinary action" against third-party distributors); *United States* v. *Studebaker Corp.*, 1965 Trade Cas. ¶ 71,410 (D. Neb.) (restricting independent dealer territories); *United States* v. *Greater New York Roll Bakers Ass'n*, 1964 Trade Cas. ¶ 71,265 (S.D.N.Y.) (eliminating competing producers).

To remove the uncertainty respondent has raised regarding the position of the United States, petitioners are filing with this Reply a motion that this Court solicit the views of the United States both on its own enforcement policy and on the general question of the proper scope of the intra-enterprise conspiracy doctrine. This Court has frequently invited the United States to submit *amicus curiae* briefs on antitrust questions with broad significance. *E.g.*, *AT&T* v. *Phonetele, Inc.*, 51 U.S.L.W. 3253 (October 4, 1982); *Weit* v. *Continental Illinois National Bank*, 454 U.S. 810 (1981).

Clarification of these points is, as the present *amici* briefs demonstrate, of vital importance to the efficient planning of corporate enterprise. The Chamber of Commerce of the United States emphasizes that the existing "confusion and resulting uncertainty impose real economic costs on the business community, which must sacrifice legitimate efficiencies of corporate organization and integration or risk intra-enterprise antitrust liability." (p. 2) The American Iron and Steel

Institute's brief likewise underscores that the issue is "no mere academic problem" (p. 2), and urges that:

> "The rule suggested by petitioners offers this Court an opportunity to reconcile the broad statements of *Yellow Cab* with the central perception of *Sunkist* that 'grave legal consequences [should not be imposed] upon organizational distinctions that are of *de minimis* meaning and effect. . . .' 370 U.S. at 29. An approach based upon ownership and legal control would bring about greater predictability and eliminate a situation in which antitrust liability can rest on the formality of whether a company chooses to operate through separately incorporated subsidiaries or through divisions." (p. 9)

Respondent's assertion (Resp. Br. 19-22) that this Court lacks the power to adopt the rule proposed by petitioners, and that the issue must be left to Congress, is meritless. Not surprisingly, respondent cites no authority for its unprecedented claim. Rather, the cases and commentators have consistently concluded that, having fashioned the initial outlines of the doctrine, this Court is free to redefine its contours. (*See, e.g.*, Handler & Smart, *supra*, 3 Cardozo L. Rev. at 26; App. I-5-6) Indeed, if limitations on the doctrine were really "an impermissible, judicially created exemption" from the Sherman Act (*id.* at 8), this Court's decisions in *Sunkist Growers* and *Citizens & Southern* would have been impossible.

II. This Court Should Confirm That Market Share And Structure Evidence Is Crucial In Rule Of Reason Cases.

There are equally compelling reasons for this Court to insist that market share and structure evidence must be examined in a rule of reason case in order to determine whether defendants possessed sufficient market power to have the adverse effect on competition required to bring the Sherman Act into play. This is not an issue of the sufficiency of the evidence, as respondent urges (Resp. Br. 8), but of the

proper market factors to be weighed by the jury and the reviewing court in assessing competitive impact. The refusal by the courts below even to consider the crucial evidence that the relevant market here was at all times competitively structured impermissibly transformed a routine tort action into a violation of the federal antitrust laws.[3]

It is axiomatic under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), that the antitrust laws only provide "protection of *competition*, not *competitors*." (*Id.* at 488; emphasis in original) Decisions from other circuits make clear that in assessing whether an adverse effect on *competition* has occurred—which is the vital factor separating Sherman Act remedies from those under state tort and unfair competition laws—it is imperative to consider "the defendant's market share before and after the unfair conduct, the number and relative size of firms in the market, the conditions of entry, the potential competition from firms outside the market, and whether a trend toward concentration exists." *Northwest Power Products, Inc.* v. *Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The reason for examining such structural evidence rests on the elementary economic principle that, where the market as a whole is competitive, "the elimination of a single competitor, standing alone, does not prove anticompetitive effect." *Kaplan* v. *Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980).

The need to take account of these legal and economic principles was critical here. The only economist to appear at the liability trial stated that, because the market was already competitive, respondent's temporary exclusion could not have had any effect on price or supply. (Brozen Tr. 5450-52; 5462-65) Faced with this evidence, the trial court plainly

[3] Because the sufficiency of the evidence is not at issue, we do not pause to correct respondent's factual misstatements. Suffice it to observe that respondent never cites to the factual summary by the court of appeals, only to its own selective quotations from a contested record.

erred in failing to instruct on the important role of market share and market structure proof.[4]

The Seventh Circuit was equally in error in *assuming*, without a critical review of the structural evidence, that the exclusion of respondent as a potential competitor led to a diminution of competition. (Pet. 23) Its approach ignored the clear statements of this Court that foreclosure of a new entrant is unlikely to have an adverse impact on competition where the market is not highly concentrated. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 603 (1974). Though applying Section 7 of the Clayton Act, the *Marine Bancorporation* analysis is equally applicable here, since the statute's incipiency standard requires even *less* of a showing of market impact than Section 1. (*Compare* Resp. Br. 27)

Conclusion

A writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals for the Seventh Circuit.

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[4] Respondent's argument (Resp. Br. 26 n.25) that the jury was not "precluded" from considering such evidence is specious; it was incumbent on the trial court to charge the jury to consider it.

No. 82-1260-CFX
Status: GRANTED

Title: Copperweld Corporation, et al., Petitioners
v.
Independence Tube Corporation

Docketed:
January 28, 1983

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Jentes, William R., Griswold, Erwin N.

Counsel for respondent: Grimm, Victor E.

Entry	Date	Note	Proceedings and Orders
1	Jan 28 1983	G	Petition for writ of certiorari filed.
2	Jan 28 1983		Appendix of petitioner Copperweld Corp., et al. filed.
3	Feb 26 1983	G	Motion of American Iron and Steel Institute for leave to file a brief as amicus curiae filed.
4	Feb 28 1983		Brief of respondent Independence Tube Corp. in opposition filed.
5	Feb 28 1983	G	Motion of National Association of Manufacturers for leave to file a brief as amicus curiae filed.
6	Feb 28 1983	G	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
7	Mar 2 1983		DISTRIBUTED. March 18, 1983
8	Mar 5 1983	X	Reply brief of petitioner Copperweld Corp., et al. filed.
9	Mar 5 1983	D	Motion of petitioners to suggest that the Court invite the Solicitor General to present the views of the United States filed.
10	Mar 11 1983		DISTRIBUTED. March 18, 1983. (Above motion)
16	Mar 21 1983		Motion of American Iron and Steel Institute for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
17	Mar 21 1983		Motion of National Association of Manufacturers for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
18	Mar 21 1983		Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
19	Mar 21 1983		Motion of petitioners to suggest that the Court invite the Solicitor General to present the views of the United States DENIED. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice White OUT.
20	Jun 1 1983		DISTRIBUTED. June 16, 1983
21	Jun 1 1983		Leave to exceed the page limits on brief amicus curiae, United States, filed with JPS (A-963).
22	May 31 1983	X	Brief amicus curiae of United States filed.
23	Jun 1 1983		Application for leave to file amicus curiae brief in excess of page limits, and order granting same by
24	Jun 1 1983		Stevens, J., on June 2, 1983. Brief not to exceed 26 pages.
25	Jun 7 1983	X	Supplemental brief of respondent filed.
26	Jun 7 1983		Leave to exceed the page limits on supplemental brief of respondent filed with JPS (A-978).
27	Jun 8 1983		Order granting same not to exceed 14 pages, by Stevens,

No. 82-1260-CFX

Entry	Date	Note	Proceedings and Orders
			J.
28	Jun 14 1983	X	Supplemental brief of petitioners Copperweld Corp., et al. filed.
29	Jun 20 1983		Petition GRANTED. limited to Question 1 presented by the petition. Justice White OUT.
			**********
31	Jul 12 1983		Order extending time to file brief of petitioner on the merits until August 25, 1983.
33	Jul 12 1983		Order extending time to file brief of respondent on the merits until October 15, 1983.
34	Aug 25 1983		Brief of petitioners Copperweld Corp., et al. filed.
35	Aug 25 1983		Joint appendix filed.
36	Aug 25 1983		Brief amicus curiae of Kaiser Alum. and Chem. Corp. filed.
38	Aug 25 1983		Brief amicus curiae of Canadian Mfrs. Assn., et al. filed.
39	Aug 25 1983		Brief amicus curiae of Chamber of Commerce of U.S., et al. filed.
42	Aug 25 1983		Brief amicus curiae of United States filed.
43	Aug 29 1983		Record filed.
44	Sep 1 1983		Certified original record received. Box 1 received, 8-29. Boxes 2 thru 5 and 8 & 9 received, 9-1.
45	Sep 2 1983		Boxes 6 & 10 received.
46	Sep 7 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
47	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. and ten minutes of petitioners' time for oral argument is allotted for that purpose. Justice White OUT.
48	Sep 29 1983		Leave to exceed the page limits on respondent's brief on the merits filed with JPS (A-228).
49	Sep 29 1983		Order granting same not to exceed 65 pages by Stevens, J.
50	Oct 15 1983		Brief of respondent Independence Tube Corp. filed.
51	Oct 15 1983		Brief amicus curiae of Alabama, et al. filed.
52	Oct 18 1983		CIRCULATED.
53	Oct 24 1983		SET FOR ARGUMENT. Monday, December 5, 1983. (4th case) (1 hour)
54	Nov 12 1983	X	Reply brief of petitioners Copperweld Corp., et al. filed.
55	Dec 5 1983		ARGUED.